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THE LAW OF CRIMINAL CONSPIRACY IN ENGLAND AND IRELAND.

NO branch of the law of England is more uncertain and ill-defined than the law of Criminal Conspiracy. It is distinctly of modern growth, and its area has from time to time been extended or curtailed by the views divergent or even conflicting of the judges on whom the duty has been cast of directing juries as to the nature of the crime. In no department of English law is the want of a Court of Criminal Appeal more conspicuous. The law has in a great measure to be gathered from the charges of judges, often imperfectly reported, which have never stood the test of argument or review before a Court of Appeal.

The expression 'conspirators' as a legal term appears to have its origin in the ordinance of 33 Edward I, entitled 'A Definition of Conspirators.' This ordinance is directed against confederacy and alliance for the false and malicious promotion of indictments and pleas and various forms of 'maintenance.' Even Blackstone only mentions 'conspiracy' as the crime 'where two or more conspire to indict an innocent man of felony falsely and maliciously, *who is accordingly indicted and acquitted*[1].' All these ingredients were necessary for the crime of conspiracy. It had however been held in the Star Chamber in the Poulterer's case[2] in 1611 that an agreement for a conspiracy, still using the term in a strict sense, was itself indictable, whether the conspiracy was actually carried into effect or not.

After the decision in the Poulterer's case the doctrine that a combination to commit a crime was itself criminal was extended to other cases than that of 'conspiracy' properly so called, and the agreement or combination itself received the name of conspiracy. During the seventeenth century the Star Chamber, and after its abolition the Courts of Exchequer and King's Bench, assumed

[1] Com. iv. 136.

[2] 9 Coke's Reports, 55.

a wide jurisdiction to inflict punishment for wrong-doing[1]. Thus practically the area of the criminal law was greatly extended, and the law of conspiracy kept pace with the extension of the criminal law.

It would serve no good purpose to trace the history of the law of conspiracy since the Poulterer's case, if it were possible satisfactorily to do so. What is more material for the purpose of the present paper is to ascertain as far as possible what was the state of the common law as to the necessary elements of the crime of conspiracy at the time of the passing of the Criminal Law and Procedure (Ireland) Act, 1887[2].

The principal class of acts which undoubtedly are punishable as conspiracies afford little difficulty. An agreement of two or more persons to commit a crime is itself criminal, whether or no the crime be actually committed. The criminality consists in the intention, which must be proved by evidence of agreement or combination with the criminal purpose. Proof of these facts justifies a conviction.

The crime which is the subject-matter of the agreement may either be the final end and purpose of the agreement, or may be the means by which an innocent or non-criminal purpose is to be effected. The only question which presents any difficulty in reference to this class of combinations appears to be where the object of the combination is or may be merely a minor offence. The criminal act contemplated must probably be an offence of sufficient gravity. An agreement between two boys to violate the Park regulations by fishing in the Serpentine, could hardly be the subject of an indictment for conspiracy. The Conspiracy Act of 1875, dealing with combination in furtherance of trade disputes, limits the word 'criminal' to indictable offences, and offences punishable on summary conviction by imprisonment. Probably some analogous limitation would be applied by the Courts if and when the necessity should arise.

In considering the practical application of the law of conspiracy it is of the utmost importance to keep clearly distinct the questions of law and the questions of fact—the province of the judge and the province of the jury. In the class of combinations under consideration—combinations to commit crime—these provinces are easily distinguished. The direction of the judge to the jury is simply that they must be satisfied that the parties combined to commit crime. If crime was the natural and probable result of the combination, the jury would be justified in inferring a criminal

[1] Wright's Law of Criminal Conspiracies and Agreements, 1873, p. 8.
[2] 50 & 51 Vict. c. 20.

intention, but the question of the existence of this intention is a question entirely of fact, to be decided by the jury.

The great difficulty of the inquiry as to the necessary elements of the crime of conspiracy begins when there is no act intended by the parties combining which would be criminal if done by an individual. Beyond all question there are, as the law now stands, some cases where an indictment for a criminal conspiracy may be maintained, although if the purpose of the conspiracy were carried into effect, no indictment would lie against any individual for anything done in pursuance of the combination. The cases in which such combinations are criminal may perhaps be arranged under the following classes:—

Combinations to do acts which are injurious to the public or the government have, in some cases at all events, been dealt with by the Courts as criminal. This class of crimes was introduced by the decision in Starling's case[1] in 1663, in which certain Brewers of London were convicted for a conspiracy to 'depauperate' the farmers of excise. On a motion to quash the indictment it was held, after much doubt, that inasmuch as the 'depauperating' the farmers of excise must have the effect of making them incapable of rendering the king his revenue, the offence was 'directly of a public nature and levelled at the Government, and the gist of the offence was its influence on the public[2].' Another instance of a conspiracy which has been suggested or held to be indictable on this ground is a combination of officers to throw up their commissions in time of danger[3], and another is a combination to disturb the price of the funds by false rumours[4].

There is however very little authority beyond a few dicta as to the extent of the rule that combinations to do acts injurious to the public are in themselves criminal. Mr. Wright has shown[5] that in most, if not all, the reported cases where combinations have been held to be criminal on this ground, the acts which were contemplated would, according to the views prevailing at the time, have been considered criminal apart from the combination; and it seems impossible to describe this class of conspiracies in terms more precise than those used by Mr. Justice Stephen, 'Agreements between more persons than one to carry out purposes which the judges regarded as injurious to the public[6].'

There is a class of combinations which at one time were regarded by many high authorities as criminal, apparently on the

[1] 1 Siderfin, 174; 1 Keble, 650, 655; 1 Levinz, 125.
[2] Lord Holt in Daniell's case, 6 Modern, 99.
[3] *Vertue* v. *Lord Clive*, 4 Burrows, 2472.
[4] *R.* v. *De Berenger*, 3 Maule & Selwyn, 67.
[5] Law of Criminal Conspiracy, pp. 28, 29.
[6] Digest of the Criminal Law, Art. 160.

ground of the public injury supposed to be caused by them. These are combinations in so-called restraint of trade. Upon this ground many of the rules of trades-unions have been regarded as evidence of a combination 'to put unlawful coercion upon the will of an individual in disposing of his labour and capital, and consequently in restraint of trade, and a criminal conspiracy[1].'

As regards trade combinations the question has been set at rest by the Conspiracy and Protection of Property Act of 1875, to be presently mentioned; and unless a recent judgment[2] of the majority of the Court of Appeal, to the effect that an agreement in restraint of trade is merely void but not illegal in any other sense, is reversed or overruled, it would seem that the doctrine that combinations in restraint of trade are criminal is finally exploded, and that such an agreement no more involves criminality than an agreement to make a bet.

A second class of combinations which have in some cases been held criminal, though no criminal act apart from combination is contemplated, are conspiracies to pervert justice; and a third class is found in combinations to commit or procure certain acts of indecency or immorality. Neither of these require further notice.

A fourth class is more important for the purpose of this paper. There seems to be no doubt that a combination to cheat or defraud may be criminal though the act which is the object of the conspiracy may not be in itself criminal. It must however apparently be such an act as would if done by a single person give the person defrauded a civil remedy against the perpetrator of the act. The remedy must, it is conceived, be one for fraud properly so called, where actual deception has been used. Many instances might be given where convictions for conspiracy to defraud have been sustained, although the act contemplated by the conspiring parties was one for which only a civil remedy was available against the wrongdoer. In one case[3] indeed the expressions of Chief Justice Cockburn go further; and appear to recognise the principle that a conspiracy to commit a civil injury is in every case indictable. The case in question however was a conspiracy to defraud, and as Mr. Justice Stephen remarks[4], these expressions must probably be limited to the particular class of conspiracies to defraud.

Whether or not there is a still more comprehensive class of criminal conspiracies than any of those which have been above

[1] Sir W. Erle on Trades Unions, p. 19. See too the observations of Grose J. in *R.* v. *Mawbray*, 6 Term. Reports at p. 636. Cf. Crompton J. in *Hilton* v. *Eckersley*, 6 E. & B. 47, 24 Law Journal, Queen's Bench, 355.

[2] *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, 23 Q. B. D. 598.

[3] *R.* v. *Warburton*, L. R. 1 C. C. R. 274.

[4] Roscoe on Criminal Evidence, p. 418.

enumerated, is a question which must be regarded as unsettled by authority in England. The question may be put thus—Is a combination to injure, an individual or a class otherwise than by a criminal or fraudulent act indictable? If so, must the contemplated injury be one for which if done by an individual there would be a civil remedy, or may a combination be criminal if in the view of the jury there is the intention to cause undue annoyance or restraint, or control of the freedom of the will, irrespective of the question whether such annoyance or restraint would give rise to a criminal or civil remedy against the person causing it?

This question is elaborately investigated by Mr. Wright[1], who after a careful analysis of every reported decision from 1611 to 1873, when his work was published, thus sums up the result of the authorities which appear to be opposed to such an extension of the criminal law: 'These authorities on the whole strongly favour the view that a combination to injure a private person (otherwise than by fraud) is not as a rule criminal unless criminal means are used.' And after reviewing such authorities as appear to lead to the opposite conclusion, he says[2]: 'It is conceived that these expressions, for the most part amounting only to a question or doubt, are not sufficient to establish exceptions to the principles involved in the decisions set out in the earlier part of this sub-section. Exceptions may perhaps be established by future decisions, but in the mean time it seems impossible to discover any clear rule by which it can be known beforehand what the nature of these exceptions may be. This difficulty presses on the law of conspiracy whenever it goes beyond the plain lines of the ordinary law, and may perhaps be greatest in the case of any such extension at this point.'

On the other hand, in the final Report of the Royal Commission on the Labour Laws in 1875, presided over by the late Lord Chief Justice Cockburn, it is stated to be the law that a conspiracy exists[3] 'where with a malicious design to do an injury the purpose is to effect a wrong, though not such a wrong as when perpetrated by a single individual would amount to an offence under the criminal law.' The wrong may be no more than a civil injury. In the view of the Commission it is the malicious intent to injure, the wrongful purpose of the combining parties, which constitutes the essence of the crime. But against this authority must be set that of the Criminal Code Commissioners, Lord Blackburn, Justices Barry, Lush, and Stephen, appointed in 1878. It can hardly be disputed that when the composition and purpose of this Commission is borne in mind the statements of law contained in the Report are entitled to greater weight than those of the mixed Com-

[1] Law of Criminal Conspiracies, pp. 37–43. [2] p. 42. [3] p. 25.

mission of lawyers and laymen presided over by Chief Justice Cockburn. The Criminal Code Commissioners, in the draft code appended to their Report, dealt with treasonable and seditious conspiracies (clauses 77, 162), conspiracies to bring false accusations and to pervert justice (126, 127), to defile (149), to murder (with a view to increase of punishment, 180), to defraud (284), to commit indictable offences (419, 420), to prevent collection of rates and taxes (421). In the Report, after enumerating the above-mentioned classes, they say [1], 'There is not any distinct authority for the proposition that there are at law any criminal conspiracies other than those referred to; but some degree of obscurity exists on the subject. An agreement to do an "unlawful" act has been said to be a conspiracy, but as no definition is to be found of what constitutes "unlawfulness," it seems to us unsatisfactory that there should be any indictable offence of which the elements are left in uncertainty and doubt.' And in Mr. Justice Stephen's Digest of the Criminal Law, conspiracy to injure otherwise than by fraud finds no place amongst crimes known to the law.

The history of the law of conspiracy appears to show that from time to time, especially when social questions become prominent, there is a tendency to extend the area of the law of criminal conspiracy. The prevailing sentiments of the time find almost unconsciously an echo upon the judicial bench; and new combinations designed to effect objects which are generally regarded as unjust or pernicious, are at first looked upon as criminal conspiracies. Thus it was with the rules of trades unions. The views of some judges have already been alluded to. Probably the ruling which has carried to the furthest extent the legal conception of a conspiracy, is that of the present Lord Bramwell in Druitt's case in 1867 [2], and of Lord Esher in Bunn's case in 1872 [3].

Lord Bramwell is reported in the case referred to to have told the jury that combinations to restrain liberty of mind and thought and freedom of will by coercion and compulsion—'something that was unpleasant and annoying to the mind operated on'—were undoubtedly criminal. He said that if the action of the picket 'was calculated to have a deterring effect on the minds of ordinary persons by exposing them to have their motions watched and to encounter black looks, that would not be permitted by the law of the land [4].'

[1] p. 16. [2] 10 Cox, 592. [3] 12 Cox, 316.

[4] Mr. Justice Stephen (Hist. of Criminal Law, iii. 222) observes on this ruling, 'If this is correctly reported and is good law, it would follow that if two brothers having a sister who was about to contract a marriage which they disliked agreed together to exclude her from their society if she did so, in order by the threat of so doing to prevent the marriage, they would be guilty of an indictable conspiracy. This seems to me to show that the law was laid down far too widely on the occasion in question.'

In Bunn's case Lord Esher told the jury that they ought to convict if they were satisfied that there was an agreement 'to force the Gas Company to conduct the business of the Company contrary to their own will by improper threat or improper molestation;' 'and I tell you that there is improper molestation if there is anything done with improper intent which you shall think is an annoyance or unjustifiable interference, and which in your judgment would have the effect of annoying or interfering with the minds of persons carrying on such a business as this Gas Company is conducting[1].'

. According therefore to the rulings of Lord Bramwell and Lord Esher, annoyance and interference by means not only not criminal, but not even necessarily actionable, if committed by an individual, may and ought to expose the parties combining to use such means to an indictment for a conspiracy. This appears to go considerably beyond the law as stated in the Report of Chief Justice Cockburn's Commission. It is there considered essential for a criminal conspiracy that there should be a malicious intent to injure, and that the means contemplated should be such as, if carried into effect by an individual, would expose him to a civil action. It is probably in reference to the rulings in question that the Commissioners observe[2]: 'Whether there are cases in which, upon a correct view of the law, parties may be held liable on a charge of conspiracy where the end is not wrongful or the means criminal, is a matter into which we do not think it necessary to enquire, as if such be the law, which we greatly doubt, we are prepared . . . to recommend . . . that the law should be amended[3].'

Other judges appear in similar cases of trades-union prosecutions to have adopted a rule far less wide than that laid down by Lord Bramwell and Lord Esher, or even than that stated in the Commissioners' Report. In 1847 Lord Cranworth, then Baron Rolfe, laid down that there must be molestation by threats or violence contemplated by the combining parties to make the combination criminal[4]; and in 1868 and 1869 the late Lord Justice Lush appears to have stated the law in the same sense notwithstanding the ruling in Druitt's case[5].

[1] 'This decision caused great dissatisfaction amongst those who were principally affected by it, and was perhaps the principal occasion of the repeal of the Act of 1871, and the enactment in its place of the Conspiracy and Protection of Property Act, 1875.' Stephen, Hist. of Criminal Law, iii. 225.

[2] Parliamentary Papers, 1875, Report, p. 26.

[3] Earlier in the Report the Commissioners say: 'Conspiracy in the form which we have here to deal with always presupposes an act or an end in itself criminal or wrongful, or which if done by a single individual would give a right of action or other civil remedy as being a violation of another's right.'

[4] *R.* v. *Selsby*, 5 Cox, 495.

[5] *R.* v. *Sheridan*, *R.* v. *Shepherd*. See Wright, p. 50.

It thus appears that at the date of the passing of the Conspiracy Act of 1875 there were three principal views as to the necessary elements of a criminal conspiracy at Common Law. First, there was that deduced by Mr. Wright from the whole of the authorities, and strongly supported by the Report of the Criminal Code Commission, that as a general rule combinations to injure an individual otherwise than by fraud are not criminal unless criminal means are used. Secondly, that of Chief Justice Cockburn's Commission, that a combination to commit a civil wrong with malicious intent to injure is criminal. Thirdly, that of Lord Bramwell, that a combination to restrain freedom of will and action by means which the jury think improper is criminal.

This conflict of authority was put an end to as regards trade-combinations by the Legislature, which enacted in 1875[1] that 'an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.'

In England the restriction of the doctrine of conspiracy by this enactment, whether or not it be merely declaratory of the common law, has greatly diminished the practical importance of the law relating to illegal combinations. But the unprecedented activity with which the law or supposed law of conspiracy has been enforced in Ireland as regards combinations of agricultural tenants, combinations which do not fall within the above-mentioned enactment, renders the enquiry as to the limits of the common law of criminal conspiracy of great importance at the present time.

No phrase has been more constantly repeated, and that by judges of the highest eminence[2], as if it contained an adequate definition of the law of conspiracy, than Lord Denman's dictum that 'the indictment ought to charge a conspiracy either to do an unlawful act or a lawful act by unlawful means.' This expression was used in a case[3] where the question was whether an indictment could be maintained for a conspiracy to conceal a part of the personal property of the bankrupt. In holding the indictment bad as not sufficiently averring a valid bankruptcy, on the ground that it was consistent with the indictment that the removal of the goods was perfectly legal, Lord Denman used the expression quoted. He subsequently stated[4] that the words '*at least*' ought to have been

[1] The Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86.

[2] e.g. C.J. Tindal in O'Connell's case, 11 Clerk & Finnelly, 155; Willes J. in Mulcahy's case, Law Reports, 3 House of Lords at p. 317; and Bowen L.J. in *M'Gregor, Gow & Co.* v. *Mogul Steamship Co.*, 23 Q. B. D. at p. 616.

[3] *R.* v. *Jones*, 4 Barnewall & Adolphus, 345. See Wright, p. 63.

[4] *R.* v. *King*, 7 Queen's Bench, 788.

inserted, and in another case that he did not think the phrase 'very correct[1].' It is pointed out, both by Mr. Wright[2] and Mr. Justice Stephen[3], that as a definition of conspiracy the phrase is clearly inaccurate. The word 'unlawful' is ambiguous. If by 'unlawful' is meant criminal, the definition is too narrow, since, as has been shown above, there may in some cases be a criminal combination without the contemplation of the doing of any individual criminal act; if by 'unlawful' is meant 'wrongful,' a violation of a private right, the definition is too wide, because, in England at all events, it has never been judicially decided that a combination merely to commit a breach of contract[4] or a tort is criminal.

If indeed it were law that an agreement to commit a breach of contract is itself criminal, it is difficult to see why two or more partners who determine to repudiate an onerous contract and to run the risk of whatever civil remedy there may be, are not also criminally responsible, although the design may never have been carried into effect. And yet who ever heard of such a prosecution? Could the Directors of the Great Western Railway have been indicted when they endeavoured to get rid of the obligation contracted in the infancy of the railway that every train should stop for ten minutes at Swindon?

The questions which, as has been shown, are left undecided by the English Courts, appear in Ireland not to be considered as any longer open. The social condition of that country since 1879 has been extremely favourable to the growth of the law of conspiracy. Just as in England during the period when the power of trades-unions was growing, and was generally considered a source of social danger, there are distinct symptoms of a tendency on the part of judges to adopt a wider definition of criminal conspiracy than had previously been recognised, so in Ireland, where combinations of various kinds have been formed, having for their object the aiding of agricultural tenants to resist payment of the full amount of rent legally due to the landlords, the Courts have shown a disposition to condemn as criminal combinations which they regard as formed for unlawful though not necessarily criminal purposes, and thus to lay down a definite rule having the effect of bringing these combinations within the pale of the criminal law.

The rule which, as Mr. Justice Stephen states, no English Court has ever laid down, that a combination to break contracts is

[1] *R.* v. *Peck*, 9 Adolphus & Ellis, 690. [2] p. 65.

[3] Roscoe on Criminal Evidence, p. 417 (ed. 1877).

[4] 'Nor again does any case go so far as to decide that a combination to commit a breach of contract is a conspiracy.' Stephen, in Roscoe's Criminal Evidence, p. 417. And in Bunn's case, upon the counts charging conspiracy to break contracts upon which the defendants were convicted, Lord Esher was careful to point out that the breach of the contracts in question was by statute a criminal offence.

criminal, seems to have been adopted by the late Lord Fitzgerald and Mr. Justice Barry upon the trial at bar of Mr. Parnell and others for a criminal conspiracy in 1881 [1]. The question was raised by the frame of certain counts of the indictment, which in substance charged that the defendants, intending to impoverish and injure the owners of farms, solicited large numbers of tenants, in breach of their contracts of tenancy, to refuse to pay and not to pay the rents which they were lawfully bound to pay. In summing up the case to the jury the late Lord Fitzgerald adopted C.J. Tindal's quotation of Lord Denman's words, before noticed, in the broadest sense of the ambiguous word 'unlawful.' He told the jury that the law was 'plain and clear;' that an agreement of two or more persons to commit any wrongful act was a criminal offence. He said, 'If a tenant withholds his rent, that is a violation of the right of the landlord to receive it; but it would not be a criminal act in the tenant, though it would be in the violation of a right; but if two or more incite him to do that act, their agreement so to incite him is by the law of the land an offence.' 'And, gentlemen, I have to declare to you that it is a criminal offence where two or more agree to do an injury to a third party, or class, though that injury if done by one alone of his own motion would not be in him a crime or an offence, but would be simply an injury carrying with it a civil remedy.' The counsel for the defendants appears to have excepted to these rulings, and to have cited some of the authorities above referred to in support of his contention that an agreement merely to commit a civil injury is not criminal. The judges however adhered to Lord Fitzgerald's ruling. Mr. Justice Barry, in giving judgment, did not deal with the authorities cited, but contented himself with quoting the statement of the law contained in the Report of Chief Justice Cockburn's Commission mentioned above. This however appears hardly to support Lord Fitzgerald's ruling to its full extent, which omits or throws into the background the important qualification stated by the Commissioners, that the wrongful act must be accompanied with the 'malicious intent to do an injury.'

Lord Fitzgerald's ruling in this case appears to have settled the question as regards Ireland; and a combination to break a contract, or not to pay rent, has apparently since been regarded as a criminal conspiracy. Accordingly, after the promulgation of the Plan of Campaign in 1886, Mr. Justice Murphy, in *Reg.* v. *Dillon* [2], is reported to have said that 'it was clearly and manifestly an offence for two or more persons to urge tenants not to pay the rents they had contracted to pay.' 'In looking at the Plan of Campaign, it was for

[1] 14 Cox, 508. [2] Times, Feb. 25, 1887.

the jury to say whether it advised tenants to combine among themselves not to pay the rents they had contracted to pay. If they did, they committed the offence charged, in seeking to frustrate the landlord's claim.' Thus the step was taken in Ireland which, as has been shown, had never been taken by any English Court, and it was in effect declared that an agreement to break a contract was in itself an indictable offence [1].

A further development of the law of Criminal Conspiracy, either as a distinct addition to the law or as a statutory declaration of what had previously been undefined and uncertain, is probably to be found in the construction which has been placed upon the second section of the Criminal Law and Procedure (Ireland) Act, 1887. The section, so far as it relates to the matter in question, is in the following terms: 'Any person who shall commit any of the following offences in a proclaimed district may be prosecuted before a court of summary jurisdiction:—(1) Any person who shall take part in any criminal conspiracy now punishable by law *to compel or induce* any person or persons either not to fulfil his or their legal obligations, or not to let, hire, use or occupy any land, or not to deal with, work for or hire any person or persons in the ordinary course of trade, business or occupation, or to interfere with the administration of the law. (2) Any person who shall incite any other person to commit any of the offences hereinbefore mentioned.'

It will be observed that this section appears to deal only with a limited class of conspiracies 'already punishable by law;' that the conspiracies in question are conspiracies 'to compel or induce' other persons to do or abstain from doing certain specified acts. The section does not strike directly at conspiracies not to fulfil legal obligations, or not to deal with, work for or hire other persons, etc., but only at conspiracies 'to compel or induce,' etc. The party protected is not the landlord or the boycotted person, but the person who is subject to the compulsion or inducement [2]. The criminal element of the combination must therefore, it would seem, be

[1] There appears to be no statement in the recent Report of the Special Commission as to the view taken by the Commissioners of the law of conspiracy. But the terms of their finding upon the second charge (Report, p. 54) appear to lead to the inference that the Commissioners acted upon a view of the law substantially similar to that expressed in the Report of the Commission presided over by Chief Justice Cockburn.

[2] In *in re Heaphy*, 22 Law Reports, Ireland, p. 500, Palles C.B., adopting Lord Bramwell's view of the law, says 'that there was evidence that the refusal on the part of the defendants to supply the police with bread, was in pursuance of a common action with a view of injuring the police. Thus there was evidence of a conspiracy punishable at common law by indictment. That however is not sufficient to sustain this summary conviction. To do so there should be also evidence that this refusal should be effected either by compulsion or by undue influence.' And after commenting upon evidence which tended to show that Barry, a defendant, refused under the influence of fear, says that to convict upon evidence showing that Barry was intimidated but not that he was intimidating others, 'would be to mistake the injured party for the criminal.'

found in the words 'compel or induce;' the means of compulsion or inducement must be unlawful in the sense that if two or more persons agree to employ them they are guilty of a crime. What then amounts to criminal compulsion or criminal inducement within the meaning of the section?

This question was dealt with in 1887 by the Irish Exchequer Division in the case of *In re Heaphy*. The magistrates had convicted the defendants, who were shopkeepers, on a charge of conspiracy. The evidence showed a contemporaneous refusal to supply the police with bread. The defendants having been sentenced were released by the Exchequer Division by the issue of a writ of habeas corpus; the majority of the Court being of opinion that, upon an application for a writ of habeas corpus, the Court had jurisdiction to examine the depositions to ascertain whether or no the evidence justified the conviction. The jurisdiction having been established, there appears to have been no difference of opinion that the conviction was wrong, inasmuch as there was no evidence of 'compelling or inducing' within the meaning of the section, although there was evidence on which an indictment might have been sustained. Chief Baron Palles, in delivering the principal judgment, said, 'A conspiracy not to deal with another person is not *per se* within the Act. To bring it within the Act the conspiracy must be to compel or induce persons not to deal with. "Compel" involves the exercise of some force or restraint either upon the body or will of the person affected, and it cannot be contended that if "induce" were not in this section the offence contemplated by it would not be essentially one of intimidation.' But how as to the word 'induce'? The Chief Baron held that to make an inducement criminal, at all events where as in the case in question the act which it was the object of the conspiracy to accomplish was not criminal, it must be such as 'to unduly affect or control the free will of the person against whom it is exercised;' and he quotes with approval Lord Bramwell's language in Druitt's case above referred to. The question of fact therefore, according to the Chief Baron, in cases falling within the statute is—Was there an agreement unduly to affect or control the free will of the person against whom it was directed? If so, there is a criminal inducement within the meaning of the section[1].

[1] Most of the forms of summonses under the section in question which have come under my notice charge a conspiracy to induce to do or not to do one or more of the specified acts, but do not specify the nature of the act or acts of inducement. The following form may be taken as typical: 'Whereas a complaint has been made to me that you etc. on etc. at etc., being a district proclaimed etc., did with other person or persons whose names are unknown unlawfully take part in a criminal conspiracy punishable by law at the time of the passing of the said Act, to wit—To induce certain persons whose names are unknown, to wit certain shopkeepers, mechanics,

If the interpretation thus put upon this statute by Chief Baron Palles is correct, it would seem that the section marks another step in the progress of the law of conspiracy, at all events in a proclaimed district.

The statute as interpreted by the Chief Baron seems to assume, or rather to declare, that an agreement by two or more persons to commit an act, which if done by an individual is not a criminal offence or a civil injury, may itself be criminal. The criminality lies in the agreement to compel or induce. It is true that the Chief Baron says that the words in the earlier part of the section render it necessary that the word 'unduly' should be introduced to qualify the word 'induce.' But he does not go so far as to say that the means of inducement must amount to a criminal act or even to a civil injury. On the contrary, he adopts Lord Bramwell's view of what may amount to undue inducement. It appears therefore that, if this be the correct interpretation of the statute, the Legislature has adopted the view of those judges who have laid down in the broadest terms the definition of undue coercion or inducement, in preference to the view of those who think no coercion or inducement criminal unless criminal means are contemplated; and has even gone further than the wider view taken of the law of conspiracy by Chief Justice Cockburn's Commission.

No one who reads Lord Bramwell's summing up in Druitt's case, or Lord Esher's in Bunn's case, or the judgment in Chief Baron Palles in Heaphy's case, can help being struck with the indefiniteness of the expressions used to define the crime of conspiracy. What is that 'compulsion or restraint' which it is criminal to agree to use in order to 'coerce liberty of mind and thought'? What is 'unjustifiable annoyance and interference with persons in the conduct of their business'? What acts amount to 'unduly affecting or controlling the free will of the person against whom they are exercised'? It is obvious that language so vague leaves an almost boundless latitude to juries, or to the magistrates who under the statute are substituted for juries as judges of fact.

The question indeed becomes almost entirely one of fact, and for the first time in the history of the law of conspiracy the question of fact has to be decided by the same members of the tribunal who

artizans and labourers who were or might be desirous to deal with or work for in the ordinary course at their trade, business or occupation, persons who had used or occupied or should use or occupy farms of land in Ireland from which tenants had been or might be evicted in due course of law, not to deal with or work for such persons as aforesaid.' It might be a question whether an indictment in the form of such a summons would not be bad as being too general. See *R.* v. *Rowlands*, 17 Q. B. 671.

In one case the essential words 'compel or induce' were omitted in the summons, but supplied by amendment on appeal from the conviction by the County Court Judge. *In re Russell*, 22 Law Reports, Ireland, p. 487.

have to rule the question of law. And the adoption of the largest and most indefinite view of the law of conspiracy leaves the tribunal practically without a check, except by way of appeal on the question of fact, where the sentence is sufficiently severe,—never a very efficient remedy.

It is no part of the object of this paper to attempt to review or criticise the way in which the duty of deciding the question of fact has been in practice discharged. But it is permissible to question whether it is wise to leave to justices powers so vast and indefinite as are involved in determining without further guide than their own sentiments what is and what is not undue or improper inducement.

Even where the functions of judge and jury have been kept separate, the Legislature has found it necessary to lay down a far narrower and more definite rule as to what constitutes criminal combination in furtherance of trade disputes than is to be gathered from the rulings of Lord Bramwell and Lord Esher or the Report of Chief Justice Cockburn's Commission. It is difficult to see why a rule which is just as regards trade combinations, should not also be just as regards agricultural or any other combinations, which the varying circumstances of the social or political conditions of the time may bring into prominence. The general rule suggested is, that where crime is the object or direct result of the combination, the combination should be held to be a criminal conspiracy, but not otherwise.

It is above all things desirable in criminal law that what is and what is not crime should be clearly and intelligibly defined, and that the infliction of punishment should accord with and not jar upon the general sentiment of the community. These ends are not attained, but are frustrated, if the law of conspiracy is extended so as to render criminal what large classes of the community refuse to regard as crime. In the Indian Penal Code as originally drafted by Lord Macaulay, and as it at present exists, conspiracy other than conspiracy to wage war on the Government is no crime unless a crime is contemplated by the conspiracy[1]. Our own law is the

[1] See Penal Code, 1837, chap. iv. on Abetment; Indian Penal Code, xlv. of 1860, sects. 107, 109. Lord Macaulay's reasons for this exception are worth quoting; Notes on Code, p. 28: 'In the first place, war may be waged against the Government by persons in whom it is no offence to wage such war, by foreign princes and their subjects. Our general rules on the subject of abetment would apply to the case of a person residing in the British territories who should abet a subject of the British Government in waging war against that Government; but they would not reach the case of a person who, while residing in the British territories, should abet the waging of war by any foreign prince against the British Government. In the second place, we agree with the great body of legislators in thinking that, though in general a person who has been a party to a criminal design which has not been carried into effect ought not to be punished so severely as if that design had been carried into effect, yet an exception to this rule must be made with respect to high

same as regards the most important combinations known in this country. But in Ireland the prevailing combinations are not in furtherance of trade disputes, and consequently the theory and still more the practical application of the law is widely different. Is there not a case made out for adopting as the general rule of law the principle recognised by the Indian Penal Code, the Act of 1875, and the Criminal Code Commissioners? Is it possible to administer the law as declared by the Act of 1887 without serious risk of injustice to individuals and of danger to the State?

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offences against the State. For State crimes, and especially the most heinous and formidable State crimes, have this peculiarity, that if they are successfully committed the criminal is almost always secure from punishment. The murderer is in greater danger after his victim is dispatched than before. The thief is in greater danger after the purse is taken than before. But the rebel is out of danger as soon as he has subverted the Government. As the Penal Law is impotent against a successful rebel, it is consequently necessary that it should be made strong and sharp against the first beginnings of rebellion, against treasonable designs which have been carried no further than plots and preparations. We have therefore not thought it expedient to leave such plots and preparations to the ordinary law of abetment. That law is framed on principles which, though they appear to us to be quite sound as respects the great majority of offences, would be inapplicable here. Under the general law a conspiracy for the subversion of the Government would not be punished at all, if the conspirators were detected before they had done more than discuss plans, adopt resolutions, and interchange promises of fidelity. A conspiracy for the subversion of the Government which should be carried as far as the Gunpowder Treason, or the assassination plot against William the Third, would be punished very much less severely than the counterfeiting of a rupee or the presenting of a forged cheque. We have therefore thought it absolutely necessary to make separate provision for the previous abetting of great State offences.'

REGISTRATION—OR SIMPLIFICATION—OF TITLE?

I.

IT is too late to discuss the question whether any further reform of the laws which regulate the tenure, transfer, and transmission of English land is desirable. Upon this point there is a wonderful unanimity. All political parties are agreed that something should be done. But, after a triple failure, it may well be deemed an open question whether Registration of Title is the direction which reform can most wisely take. Attention has recently been so exclusively directed to this branch of the subject that the wider questions why Reform is desirable, and how it can best be obtained, have, for the last three years, been comparatively neglected.

It may, therefore, be worth while to consider what inconveniences and disadvantages have been complained of by advocates of reform, as incident to our present system; to glance at their causes; to see how far they have already been removed by remedial legislation; and to inquire, not only whether Registration of Title is entitled to the preference over other proposals for reform which it appears recently to have gained in professional and political opinion, but whether it even gives reasonable promise of proving a panacea for the evils of dilatory and costly transfer. In the performance of this task there is but little scope for originality. It requires, rather, a review of arguments and suggestions which have already emanated from authorities of eminence and experience. A perusal of the principal works and articles which have recently been published on the subject, leads to the conclusion that the object of most advocates of reform is to remove or diminish inconveniences and disadvantages which are considered to affect:—

(*a*) Landowners and their families.
(*b*) Land, and its occupiers, and cultivators.
(*c*) The community as a whole.
(*d*) Dealings with the land.

Chief among the inconveniences and disadvantages which are said to affect landowners and their families, are those incident to the positions of tenants for life and remaindermen in tail under strict settlements. The old objections that eldest sons are often too independent of parental control, and under great temptation

to extravagance, have been supplemented by a more modern one, to the effect that they are less often encouraged to cultivate prudent and economical habits than would be the case if they were generally placed in positions more similar to those of younger children. After all due allowance for exaggeration, experience proves that these objections are not unfounded.

A tenant for life under a Strict Settlement suffers a double pecuniary hardship: his income is usually lessened by charges in favour of the families of prior tenants for life, and his own powers of charging seldom enable him to provide adequately for his younger children except out of savings of income, unless he is fortunate enough to possess other property than the family estates. If misfortune overtakes him, the nature of his interest in the land precludes him from raising money except upon exorbitant terms. He must give, as security, not only a mortgage of his life estate, but a policy of assurance upon his life, and the premiums and interest form a heavy deduction from an insufficient income. In extreme cases, the entire income has been for years appropriated by an incumbrancer, leaving nothing for the support of the tenant for life or his family.

A hardship incident to a strict settlement in tail male arises when the daughters of a tenant for life who has no male issue are compelled to give up the family house and estate, on their father's death, to some collateral remainderman in tail. Where a settled estate is of comparatively small value, it is not improbable that it may be considerably reduced by litigation in relation to the various interests and charges to which it is subject. The law of primogeniture is objected to, not only on the ground that it is unjust in principle, but because (although the cases in which it directly operates are comparatively few) it is considered indirectly to encourage strict resettlements with all their inconveniences.

The occupiers and cultivators of land suffer from the effect of existing laws, principally in the two cases of land subject to strict settlements, and land subject to building leases. The chief interest of a tenant for life is to obtain the largest possible income from the land. Even if he feels the responsibility of real ownership, he has little, if any, inducement to spend his own money on the most necessary of improvements. To do so would confer an additional benefit upon an eldest son (or collateral remainderman in tail) already amply provided for, at the expense of the younger children or daughters of the tenant for life. If he desires to improve the land he often lacks the means to do so, unless he resorts to the powers of the Improvement of Land Acts or Settled Land Acts. How far these Acts have removed this objection will

be subsequently considered. While a tenant for life has too often neither inducement nor means to improve the land, the law relating to fixtures and improvements is not such as to encourage tenants for years to make permanent improvements, especially in the numerous cases where land is held under short leases or yearly tenancies. Settled land is therefore too often neglected, while the labourers who cultivate it are lodged in badly-built, badly-drained, unhealthy, and over-crowded cottages.

If these evils exist on the lands of resident tenants for life in possession, they are intensified when an absentee landlord is tenant for life of several estates, which for all practical purposes are managed by an agent whose chief interest is to earn a salary or commission on the rents. Still more are they aggravated when the management of settled land passes—as it too often has done—into the hands of the mortgagee of an embarrassed tenant for life.

The law of distress has been objected to as anomalous and unjust; while the system of petty tyranny which is capable of being exercised by bigoted landlords over tenants and labourers, in political and religious matters, and the mode in which the game laws are sometimes administered, have elicited deserved condemnation. A lessee of a house is often precluded from making alterations or improvements and from assigning without special licence; and if he makes extensive additions or improvements at his own expense, even with his lessor's consent, he cannot under ordinary leases obtain any compensation when his term expires, while under a building lease he may be bound to rebuild at the end of his term.

The disadvantages to the community at large which result from our present system have been too often dwelt upon to need more than enumeration. Advocates of reform are generally agreed that a large and contented rural population, and the distribution of the soil among a considerable number of independent owners, are advantageous to the community; but it seems clear that large estates continually grow larger and larger, that land tends more and more to accumulate in the hands of a limited number of proprietors, that shopkeepers, small farmers, and labourers find it difficult to purchase suitable houses, farms, or gardens, that the old class of yeomen is quickly disappearing, and that emigration to overcrowded towns is increasing. Complaints have also been made that public improvements are checked, and that ancient monuments are recklessly destroyed; while the litigation of the last twenty years has conclusively proved that commons and roadside strips have often been illegally enclosed. Unworthy men are said to be occasionally placed in positions of influence and power, and a reckless tenant for life may be encouraged in extravagance by the

knowledge that, after his death, his creditors will have no remedy against the family estate. Bad and unhealthy houses are often built upon leasehold land.

The inconveniences incident to purchases, mortgages, and other dealings with land have, perhaps, formed the chief subject of complaint. It is undeniable that the legal instruments of the past have been long, cumbrous, and often difficult to construe, that titles are not always so secure as might be desired, and that transfers, mortgages, and other dealings with land are still, in many cases, attended by vexatious delay and apparently unreasonable cost.

The mere enumeration of the foregoing inconveniences and disadvantages is almost sufficient to suggest their causes. For many of them strict settlements of land are, directly or indirectly, responsible, while others are caused by mortgages and questions as to the rights of mortgagees. The prevalent practice of resettling family estates in each generation (cutting down the interest of the head of the family for the time being to a life estate, limiting successive life estates to his sons or brothers, with remainders in tail to the unborn issue of the successive tenants for life, and giving powers to charge jointures and portions, often secured by legal terms, upon the land) creates most of the inconveniences which affect landowners and their families. The same practice, by crippling the resources and fettering the action of the owner for the time being in possession, tends to discourage permanent improvements either by tenants for life, agricultural tenants, or occupiers of settled land, and settled buildings, such as houses, warehouses, and shops. It also causes most of the disadvantages which affect the community. On the whole, the practice of resettlement is probably encouraged by the law which regulates the descent of estates in fee simple on intestacy; and the same law, undoubtedly, in some instances creates moral injustice.

Agricultural improvement is also checked by the practice of letting land on short tenancies, and by the state of the law relating to tenants' fixtures and permanent improvements. Doubtless the law of distress often inflicts hardship upon tenants both of agricultural and other properties, but it can scarcely have any direct influence in checking improvements or discouraging the scientific cultivation of land. The practice of granting building leases at ground rents, and the stringent provisions to which lessees and purchasers of leasehold houses are frequently compelled to submit, not only cause inconvenience to tenants, but are productive of most of the hardships of which occupiers of houses complain.

Insecurity of title may arise from the accidental or fraudulent concealment of a settlement or other legal instrument, from

forgery, from the exercise of the powers of tacking and consolidation which are still in many cases possessed by mortgagees, from the effect of the doctrine of constructive notice, and from liability to succession duty, Crown debts, and judgments. It may also be caused by an insufficient or careless investigation of title, or by the imprudent waiver of a tenable objection or requisition. Long and complicated deeds are not entirely an evil of the past. They are still necessary in many cases in order to carry out the intentions of the parties to well-drawn settlements, mining leases, and other instruments. Conveyances, which might otherwise be short, are often lengthened by the recitals requisite to show the respective interests of the several persons who must necessarily concur in them.

It has been pointed out by numerous experts that the cost and delay incident to mortgages and sales do not arise from the mere cost of the deed of transfer. The investigation and verification of the vendor's or mortgagor's title forms the heaviest item of expense. Although in practice a shorter title than the statutory forty years is constantly accepted, abstracts of title are often of a formidable length where property has been frequently dealt with either by way of settlement or mortgage. The most fruitful causes of long abstracts are undoubtedly the number and variety of estates, interests, and charges (legal and equitable) created by wills, settlements, and mortgages; and this applies as well to tenancies in common as to the estates and interests usually created by strict settlements. In one instance, the writer found that an estate subject to the custom of gavelkind had become divisible into 240th shares! Tenancy in common may still easily render a sale impracticable without the preliminary expense of an action under the Partition Acts. Where the abstract is long, and many of the deeds are not in the vendor's possession, the cost of production forms a serious item of expense. Searches for Crown debts, annuities, bankruptcies, judgments, legal and equitable executions, *lites pendentes* (and in Middlesex and Yorkshire in the County Registries) also add to the expense, as do fees paid to counsel, surveyors, and valuers. Although the remuneration payable to a purchaser's solicitor is now a fixed commission, it should not be forgotten that this does not include payments out of pocket for fees, stamps, searches, producing documents, and other reasonable purposes. In some cases, applications to the Court (other than Partition Actions) are still necessary, either to authorise a sale or to clear a title; and a purchaser can seldom sign a contract with absolute certainty that he will be able safely to carry it into effect without taking the opinion of a Judge under

the Vendor and Purchaser Act, 1874, to say nothing of the risk of an action for specific performance. All the causes which produce expense also create difficulty and delay. The identification of parcels may cause difficulty, especially where land held under different tenures is intermixed or boundaries have been altered. The approval and execution of the conveyance by the various persons interested often causes expense, difficulty, and delay when the land is subject to a number of estates and interests.

The chief—though not the only—causes of cost and delay in dealings with land may fairly be summed up as follows:—

(*a*) The number and variety of estates and interests (consecutive or concurrent) capable of being created.

(*b*) The charges on such estates and interests and questions as to their respective priorities.

(*c*) The necessity for ascertaining the nature of, and obtaining the concurrence of the persons entitled to, such estates, interests, and charges.

The conclusion is, therefore, irresistible that settlements and mortgages are the chief causes of costly and dilatory transfer.

Recent legislation has done much to lessen the existing evils and disadvantages; it has done little to remove them. The Settled Land Acts have conferred inalienable powers of sale, leasing, improvement, and management upon limited owners; and it is often asserted that they now possess all the powers which a prudent limited owner could desire. Those Acts have certainly rendered nearly all settled land saleable, and authorised extensive agricultural improvements, but they have not supplied any inducement to sell or to improve, especially in the case of an embarrassed tenant for life. On the contrary, the cost of the appointment by the Court of trustees for the purposes of the Settled Land Acts, and the expense and delay of obtaining the prescribed sanction to projected improvements, are calculated rather to hinder than to encourage sales and improvements. A limited owner cannot sell in consideration of a rent-charge or of purchase-money payable by instalments. There is no power to rebuild or improve existing buildings for *other than agricultural purposes*. Consequently a tenant for life of freehold houses, shops, or warehouses cannot expend settled capital money in improving or reinstating them. Moreover, ecclesiastical benefices are unaffected by the Acts. The Improvement of Land Act supplies less inducement than the Settled Land Acts to make permanent improvements, in consequence of the expense being charged on income instead of capital. Permanent improvements by agricultural tenants have been to some extent encouraged by the Act to amend the Law of Fixtures,

1851, and the Agricultural Holdings Acts, 1875 and 1883; but the Editor of this REVIEW has elsewhere[1] pointed out that an agricultural tenant has still no statutory or common law right to compensation for unexhausted improvements to the land itself, and that, except where local customs, recognised by the courts, give such a right, agricultural tenants from year to year have little inducement to make the best of their land. The Allotments Act, 1887, and the Allotments Compensation Act, 1887, have provided machinery for the acquisition of small plots of land by labourers; but it seems probable from recent experience that the cost and complication of such machinery will prevent it from being extensively put in motion.

The provisions of the Vendor and Purchaser Act, 1874, and the Conveyancing Act, 1881, have had the effect of greatly shortening contracts, conditions of sale, conveyances, mortgages, and settlements, and rendering legal instruments generally more simple and intelligible. This cannot fail (in spite of the *ad valorem* scale of remuneration prescribed by the Solicitors' Remuneration Act, 1881) to reduce the expense incident to purchases and other dealings with land; while the reduction of the cost of Acknowledgments by Married Women (by the Conveyancing Act, 1882), and the provisions of the same Act and the Land Charges Registration and Searches Act, 1888, as to official certificates of search, tend in the same direction. Increased security is given to purchasers and mortgagees by the provision of the last-mentioned Act (§ 12) avoiding unregistered land-charges (which include equitable executions), by § 3 of the Conveyancing Act, 1882, which limits the doctrine and effect of constructive notice, by § 12 of the Customs and Inland Revenue Act, 1889, which bars the right to recover Succession Duty against land in the hands of a purchaser for value, and (in Yorkshire) by § 16 of the Yorkshire Registry Act, 1884. The extension by the Conveyancing Act, 1881, of the power to relieve against forfeiture for breach of covenant has conferred a boon upon honest lessees, and rendered it difficult for unprincipled lessors to use a power of re-entry as an instrument of oppression and injustice; while the Vendor and Purchaser Act, 1874, has rendered a cheap and simple mode of procedure available in many cases, instead of an action for specific performance.

Notwithstanding the extensive amendments already effected, much remains to be done; and the schemes proposed for further reforms are many and various. They may conveniently be classified under three heads, viz.:—

[1] The Land Laws (English Citizen Series).

(*a*) Schemes for Registration of Title or Deeds.
(*b*) Schemes for Simplification of Title.
(*c*) Schemes for General Amendment of the Law.

There is a perhaps too general impression that titles may be best secured and the cost and delays of transfer most effectually reduced to a minimum by the adoption of some system of Registration. Such a system, unless devised with the utmost care and skill, might easily give rise to greater evils than those which it was intended to remove; while it would undoubtedly leave many of the existing evils which have formed the subject of complaint untouched. At various times during the last fifty years two distinct systems have been suggested, namely, Registration of Title, and Registration of Deeds; while a third system, which combines the disadvantages of the other two, is in partial operation under the Land Registry Act, 1862. It was in effect described by Lord Cairns as permitting the registration, neither of title nor of deeds, but of what the person registering *conceived to be the effect* of particular deeds. It is clear that so long as the present complicated estates and interests in land continue to exist, such a system is undesirable and dangerous.

Registration of Title has recently gained ground in public and professional opinion, in spite of the failures of the Acts of 1862 and 1875, and of the Bills of 1887, 1888, and 1889. In discussing this subject, questions at once arise as to the effect, the subject, and the application of registration. Is the title registered to be indefeasible, is it to be guaranteed by the State, or is it to depend on its own inherent strength? In other words, is registration to afford conclusive, or only *primâ facie*, evidence of title? Is the Register to deal only with legal estates in fee simple, or to recognise lesser legal estates? Are equitable estates and interests to be registered, to be otherwise protected, or to be ignored? How are incumbrances, easements, restrictive covenants, leases, tenancies, and other adverse rights to be dealt with? Are copyholds and customary freeholds to be registered? Lastly, is registration to be compulsory or voluntary? Protection against fraud and personation, proof of identity of persons and parcels, and provisions for compensation for mistakes also require careful consideration.

Registration of Indefeasible Titles is the leading principle of the Land Registry Act, 1862, and the Land Transfer Act, 1875, the registered titles being, however, subject to any registered incumbrances and to various specified liabilities, rights, interests, and restrictions. These measures also contemplate the registration of less than absolute or indefeasible titles, described in the Act of 1875 and the recent Bills as 'qualified' and 'possessory.' This appears to introduce an unwise distinction. Landowners do not

desire to advertise the imperfection of their titles, and the entry of a 'qualified' or 'possessory' title on a register which contained entries of 'indefeasible' titles would have that effect, although the discredited title might be perfectly safe, and little less than marketable. This objection, of course, applies with greatly increased weight if registration is compulsory.

It is generally agreed that if titles are to be registered as indefeasible, a stringent investigation must be made, in order to guard against mistake and fraud, before a title can be placed upon the register. Whether this be done through the medium of a Landed Estates Court, a Registrar, or an official examiner of titles, it must necessarily entail greater inconvenience and expense and more serious risk than the investigation now usual upon an ordinary sale. Under the Land Transfer Act, 1875, a person intending to register with an absolute title must not only submit to a most stringent investigation, but must give notices, by advertisement and otherwise, which practically amount to invitations to all persons interested in disputing or taking advantage of flaws in his title to come forward and assert dormant claims which might otherwise have been disposed of by the Statutes of Limitation. The same remarks apply to proceedings under the Act of 1875 for confirmation of qualified and possessory titles and confirmation of boundaries. Although the majority of titles are practically safe, few are absolutely free from objection, and an ordinary vendor can guard against defects by special conditions, while an ordinary purchaser is content to run risks which are often more theoretical than practical. But an official whose decisions will bar all hostile claims can run no risks. He must insist upon having every step in the title established by the strictest evidence. This has been forcibly pointed out in the able pamphlet recently published by the Bar Committee. The enormous risk, expense, and inconvenience incident to such an investigation are largely responsible for the failure of the Act of 1875.

Nor should it be forgotten that, upon the registration of any transfer of an indefeasible registered title, the Registrar must take extraordinary precautions (which cause inconvenience and expense) to guard against mistake and fraud, such as forgery and personation. Otherwise it is quite conceivable that two hostile claimants may have their names upon the register as indefeasibly entitled to the same land!

The Land Transfer Bill of 1889, while retaining the invidious distinction between absolute, qualified, and possessory titles, offered to a person registering an absolute title, not an indefeasible, but merely a GUARANTEED, TITLE. The registration might be vacated upon

the application of any person proving a better title to the land, and the disappointed registered owner was to receive compensation out of an insurance fund. In the colonial system the *first bonâ fide registered owner* and *bonâ fide* purchasers for value from him obtain practically indefeasible titles, while innocent registered purchasers from fraudulent vendors lose the land but receive compensation in money. So does a true owner who is deprived of his land by a mistaken first registration. This system is said to enable the Colonial Registrars to place good holding titles on the register, and to register transfers without taking the precautions hitherto considered necessary in England. But it may be doubted whether, having regard to the complicated estates and interests which exist in English land, a Registrar whose mistakes must be paid for out of an insurance fund supplemented by the public purse would, in this country, feel justified in acting upon a less stringent investigation or less certain evidence of identity than has been required under the Act of 1875. Moreover, there is all the difference in the world between an indefeasible and a guaranteed title to land. To take away consols or railway stock from an innocent purchaser, and to pay him the full money value thereof, might conceivably satisfy as well as surprise him; but to adopt a similar procedure in the case of a man who has bought a particular plot of land with a Government guarantee of title, and built a house upon it because he prefers it as a residence to any other spot of earth, would undoubtedly cause surprise unmixed with satisfaction.

To obviate the risk and expense incident to registration of indefeasible and guaranteed titles the alternative system of REGISTRATION OF *PRIMÂ FACIE* TITLES has been suggested. It is in essentials an old proposal, but, with certain modifications, it has received recent support from eminent authorities. The main feature is the compulsory registration of every estate in fee simple on the next transfer or devolution, without guarantee of title. It is proposed that there shall not be any official investigation of title, and that the effect of registration shall be to constitute the person registered, owner in fee simple, subject to the rights of the person in physical possession, and subject to any existing imperfections in the title prior to the date of registration. Registration of all future dealings is to be compulsory. The result will be to bring all titles on the register without great expense, and to render, every year, a shorter investigation of the prior title necessary. At the end of forty (or according to one proposal twenty) years the register alone would be conclusive; and the prior title would not be called for. Many purchasers would be satisfied to rely on the register alone, after a shorter interval.

Under the English Acts of 1862 and 1875 registration is voluntary. Under the colonial system it is compulsory, as to land held under Crown grants made subsequent to the Act, and voluntary as to other land. Sir R. R. Torrens suggests that it shall be made compulsory in England on the occasion of the next transfer of the fee simple for value. The Bill of 1889 proposed to give power to introduce compulsion, and this provision secured its rejection by the House of Lords. The provision in question was indeed open to serious objection:—It would inflict a heavy tax on present purchasers and devisees for the benefit of future owners. It would in many cases discredit titles by compelling the registration of perfectly safe holding titles as 'qualified' or 'possessory.' The effect of forcing upon landowners, at a time when land has considerably depreciated in value, what is an additional burden rather than a benefit, would be to check instead of to encourage alienation. Registration of *primâ facie* titles would be free from these objections.

By the Act of 1862 an attempt was made to provide for the registration of all existing estates and interests, whether legal or equitable. The colonial system is on the same principle, except that in the case of a settlement by way of trust for sale the trustees are registered as owners, and equitable interests are protected by caveats and by the addition of the words 'No survivorship,' which preclude a surviving trustee from selling until a prescribed number of trustees has been filled up. With regard to many of the estates and interests noticed on the register, this system seems (like the English Act of 1862) open to the objection that it consists partly of registration of title properly so called, and partly of registration of what *is supposed to be* the effect of certain documents. To apply such a system to English land would cause great additional cost, and in difficult cases of construction it is scarcely conceivable that the persons interested would be satisfied to adopt the opinion of the Registrar. In advocating the adoption of Registration of Title in England, Sir R. R. Torrens proposes that (so far as compulsory) it shall be limited to estates in fee simple—presumably legal estates. The English Act of 1875 in terms provides for the registration only of legal estates in fee simple and absolute interests in leaseholds, although tenants for life of settled estates are in fact registered under it. It may be doubted whether this practice is authorised by the Act. Charges may be registered; but equitable estates and interests are merely protected by cautions and inhibitions. Certain specified burdens affect all registered land unless expressly excluded, while other specified burdens may be registered as 'restrictions.'

The Bill of 1889 proceeded upon the same lines, except that it

proposed to permit the registration, as limited owner, of a tenant for life of settled land, the effect of such registration being to vest an estate in fee simple in the registered owner *and the other persons entitled* under the settlement. The trustees were also to be registered, in order to show by whom a valid receipt for purchase money (when not paid into Court) could be given. The burdens which were to affect registered land without registration are land tax; tithes; public, customary, seignorial, and manorial rights; franchises; *profits à prendre* and easements existing prior to registration, and tenancies for short terms. The burdens capable of registration were in effect charges (whether for principal sums, including vendor's liens) or leases for lives, *lites pendentes*, annuities, judgments, executions, easements, *profits à prendre* and mining rights created after registration, restrictive covenants or conditions, estates in dower, and 'any such matter as may be prescribed' by general rules. Provision was made for registration of leaseholds for terms exceeding twenty-one years.

Whether or not copyholds were intended to be registered was an ingenious puzzle which, so far as the writer is aware, has never been satisfactorily solved.

Under the schemes for registration of *primâ facie* titles it is proposed to register legal estates in fee simple. One suggestion is to enter all other estates and interests on the register as 'charges.' Another proposal is that all limited estates, and all estates and interests under settlements, should be by way of trust and be kept off the register. Under one scheme strict settlements would be dealt with practically in accordance with the Bill of 1889, while three separate additional registers are suggested for (*a*) incumbrances, (*b*) adverse rights (including easements, *profits à prendre*, restrictive covenants, and leases exceeding twenty-one years), and (*c*) reversions, as well as a separate index of incorporeal hereditaments. Under the other scheme tenants for life or trustees of a settlement would be registered as absolute owners, and remaindermen be protected by *caveats*, while a separate register of incumbrances and adverse rights is suggested.

Before leaving the subject of Registration of Title, mention must be made of two recent proposals. One is to the effect that there should be no Government or official registration, but that Registration of Title should be undertaken by a public Company who should guarantee registered titles, and be under liability to make compensation for error or fraud, similar to the present liability of the Bank of England in relation to registered Stock. It is well known that certain Joint Stock Companies have recently undertaken the business of guaranteeing or assuring mortgagees against

loss in consideration of a small premium; and the proposal, if carried out, would be an extension of this practice. It may be safely affirmed that titles would be registered by such a Company more speedily and at less expense than by an official Registrar, whether attached to a Government Department or not. The other suggestion is that properly qualified public examiners of title should be appointed, that any landowner should be at liberty to submit his title to an examiner for investigation, and to deposit the abstract with the Examiner's opinion or certificate thereon, at the Registry, and that he should sell under a special condition that no title other than the Examiner's certificate should be required. Land would, doubtless, be bought under such a condition if the professional reputation of the Official Examiners was such as to command confidence. Under this system titles could, of course, be cleared up to date from time to time; and for the case of the subdivision into small lots of a large building or other property it would provide the advantages now obtained by registration under the Act of 1875 at a fraction of the cost. The chief difficulty would be to ensure that no material deeds had been suppressed by accident or design. The experience of conveyancers proves that the ordinary requisition as to incumbrances (although not now strictly admissible) occasionally leads to the disclosure of some previously forgotten deed.

The question to what extent any scheme of Registration would remove or mitigate the inconveniences and disadvantages which have been enumerated—or such of them as are still existing—and the discussion of other suggestions for amendment of the law must be reserved for a future article.

H. Greenwood.

THE COMPULSORY REGISTRATION OF TITLES.

THE Bar Committee, at p. 81 of their Report on Land Transfer published in 1886, made some ominous remarks, which do not appear to have been honoured with Lord Halsbury's attention. 'The experience,' they said, 'afforded by the failure of the attempts which have hitherto been made in England to induce landowners voluntarily to accept registration of title, is enough to show that the introduction of compulsory registration would be an undertaking of no ordinary difficulty, and perhaps, for a politician, of no ordinary risk. Lord Westbury's Act was passed in 1862 after about eight years of the most laborious inquiry and preparation. When its failure had become manifest, a hope was entertained that, by inquiring into the causes of this failure and judiciously adapting the details of the system to meet them, a successful Act might at length be framed. Nevertheless, Lord Cairns' Act of 1875 failed more conspicuously, if possible, than its precursor of 1862. The evidence given before the Royal Commissioners of 1868 and Mr. O. Morgan's Committee completely disposes of all such explanations as "the hostility of solicitors." The people who had tried registration of titles state very clearly, that it had caused serious expense and inconvenience, without doing any appreciable good in return. There can be no doubt that, if either the Act of 1862 or the Act of 1875 had been made compulsory, it would have proved to be an intolerable public nuisance; that it would have effected an almost complete obstruction of business; that it would have provoked a formidable burst of rage and indignation; and that it would have been repealed in the very next session of Parliament.' Such was the opinion of the Bar Committee.

Lord Halsbury is aware that during the last twenty-eight years repeated and strenuous efforts have been made to induce landowners voluntarily to adopt the conveyancing methods of a Land Registry, instead of the hitherto prevailing practice. The efforts of Lord Cairns in 1875 were quite pathetic; and in some respects his expedients savoured of something like desperation. In his eagerness to attract the public, he made some bids for their favour, of which a sober judgment cannot easily approve. His Act empowered the Registrar to bar dormant claims, in cases where he thought them not likely to be successfully prosecuted; and this was accompanied by no provision for the compensation of the per-

sons whose claims might thus be barred by a secret ukase, made upon the *ex parte* application of an enemy. If the Act had met with any considerable measure of success, and this power had been extensively exercised, it could not have failed to work injustice; that is to say, a certain percentage of these arbitrarily extinguished claims would in fact have been stirred, and under circumstances which, but for the high-handed legislation of Lord Cairns, would have admitted of successful prosecution. Such claimants might with no little reason have blamed Lord Cairns for sacrificing their rights as a bribe to procure the adoption of his scheme. But there was in fact no danger. As Lord Halsbury knows, the scheme of Lord Cairns 'failed more conspicuously, if possible, than its precursor of 1862.' The verdict of the land-owning public was decisively pronounced for the second time, though Lord Cairns had exhausted his ingenuity in baiting the hook.

The reasons of Lord Cairns' failure, which were exactly the same as the reasons of the previous failure of Lord Westbury, may be succinctly stated as follows. Two problems present themselves for solution to anybody who undertakes to establish a system for the registration of titles. The first relates to the construction of the register; and the second relates to the working of the register when constructed. The two problems are not necessarily both difficult or both easy; one of them may be easy and the other difficult. It is quite possible that the construction of the register might be a laborious, tedious, and very expensive process, while the working of it when constructed might be easy and cheap. On the other hand, it is possible (though much less probable) that the construction might be easy, while the working would turn out to be difficult and expensive. The plainest common sense surely dictates the conclusion, that facility of construction will depend upon the existing state of the titles at the time, while facility of working will depend upon the simplicity of the nature of the ordinary dealings with land. If almost everybody happens to have a simple and indisputably good title, the obstacles in the way of constructing a register will disappear. People will not be afraid to produce their titles for inspection; and when produced (being by hypothesis in most cases both simple and perfect) they will require little examination, and can easily be placed on the register. Again, if the ordinary dealings with land are of the simplest possible character, if they consist almost entirely of mortgages, leases, conveyances in fee simple and specific devises, the register will be easy and cheap to work. These conditions were both of them fulfilled in Australia, and by consequence a register was there easily established and easily worked. These conditions are neither of them fulfilled in England,

and therefore the establishment of a register has in England been proved by experience to be a very laborious, tedious, and expensive undertaking; and the working of it when established, so far as it has been tried, has turned out to be very unsatisfactory in practice. It is commonly more troublesome, if not more expensive, to deal with a registered title, than it would have been to deal with the same title if it had never been registered.

The landowners having put it beyond doubt that they will not drink of this cup without compulsion, Lord Halsbury is now prepared to force the draught down their throats. The obstinacy of his determination has been very marked; and it calls for some adequate explanation. He must design to confer some great benefit upon somebody; and it is an interesting question whether this benefit is to be conferred upon the landowners, or whether (as is more usual) it is to be conferred upon somebody else at their expense. Lord Halsbury may possibly feel confidently assured in his own mind that the landowners are blindly and foolishly refusing a great blessing, for which they will thank his foresight when he has compelled them to accept it. On the other hand, he perhaps believes (as another eminent personage apparently does, or once did) that there exists somewhere a numerous tribe of people, consisting chiefly of the working man and the agricultural labourer, who are eager to buy land and are well provided with the purchase-money, but are kept back by the frightful prospect of the costs of the conveyance. If he is of this opinion, he no doubt believes also that the acceptance of his proposals by the Legislature will relieve the embarrassment of these worthy people; with the natural result, that the future votes of the new freeholders will be given to the enlightened party which saw their want and provided the remedy.

But whatever may be the motives of Lord Halsbury, it requires no great boldness to predict that, if his Bill should become law, the result will disappoint his expectations as completely as the Act of 1875 disappointed those of Lord Cairns; with this difference, that its failure will be no mere harmless disappointment, but will entail grave political consequences upon himself and his party.

The prospect which lies before Lord Halsbury, if he should succeed in persuading Parliament to allow him to compel the recalcitrant landowners to place their titles on the Register, may be thus delineated:—

(1) A serious fine will be inflicted upon the whole of the existing landowners, or their immediate representatives in title.

(2) Nearly all of these people, whom Lord Halsbury is calmly

preparing to infuriate, are Tories; and nearly all the others are Liberal Unionists.

(3) Lord Halsbury's scheme, as shall presently be shown, will not, at all events for a great many years, produce any considerable change in the present practice; which will continue to go on, side by side with and in addition to, his system of registration.

(4) Therefore the only practical result will be, even after the heavy costs of the original registration have been paid, to add the costs of the Registry Office to the ordinary costs of the present practice.

(5) The Lost Tribe, who are longing for the promised land and are ready to pay everything except the cost of the conveyance, will therefore be worse off than ever; and no votes will be gained from this source (supposing it to have any existence) to replace those which the preliminary fine will alienate.

The first of these points seems to require little proof. At present, the expense of getting an 'indefeasible' title placed upon the register is always large, and in many cases enormous; and the expense of registering even a mere 'possessory' title is a serious matter. Lord Halsbury must be a very sanguine man if he hopes that under his system the process will be much cheaper. His system is, in fact, the system of Lord Cairns, supplemented by some 'improvements,' which mightily resemble improvements in the spells and incantations by which Canidia proposed to draw down the moon. And upon a question of this kind, it is hardly sufficient for Lord Halsbury to entertain hopes, in order to convince the House of Lords that he is not mistaken, as Lord Cairns was. In this respect he is the heir of past failure; and his anticipations will lie under the disadvantage of comparison with those of former prophets.

There is also little need to enlarge upon the second of the above-stated points. The probability that people will resent being compelled to do what they dislike doing is tolerably obvious. The recent threats of the Kentish Tories when compelled to muzzle their dogs supply an effective commentary upon this text. Lord Halsbury may dimly forecast his own position, by imagining what that of Mr. Chaplin would have been if, in addition to muzzling the dogs, he had introduced and passed an Act to double the Succession Duty.

The third point, from which the fourth and fifth points follow by obvious deduction, supplies the true key to the situation, and requires to be carefully considered. The present writer is humbly

of opinion that, if Lord Halsbury's Bill should become law, hardly anybody who is compelled to register his title will attempt to place more than a possessory title upon the Register. This will leave the existing title untouched, which will therefore require precisely the same examination and treatment as at present. The result will be, as above stated, that the costs of the Registry Office will be added to the ordinary costs of the present practice, which will continue to go on, side by side with and in addition to, the system of registration.

Let us now inquire what reason Lord Halsbury can possibly have for hoping that the average landowner, if compelled to come upon the Register, will attempt to register an 'indefeasible' title. All the motives which prevented him from doing this voluntarily under the Act of 1875 will be in operation; but some of them have grown stronger and some new ones have been added. The landowners as a body are much depressed, and are ill able to bear fresh burdens. If the inquiries and proceedings of the Registry Office are to be conducted with any pretence to decency, the costs of registering an indefeasible title must inevitably be in ordinary cases heavy, and in many cases enormous. Add to this the invincible reluctance of every landowner to produce his title for inspection, unless compelled to produce it by the exigences of a contemplated mortgage or sale. To apply for an indefeasible title and fail to obtain it, is a prospect which no landowner can contemplate without a shudder; and there must be a not inconsiderable percentage of titles which could not sustain the necessary scrutiny, if this is to be conducted with decent care and efficiency. Add further, that the old hopes of some great advantage to be obtained by registration are now much dilapidated, and perhaps irreparably ruined. Among practical people they hardly exist, but are regarded as the visions of enthusiasts who are depicting a paradise of their imagination. The present writer never met with a solicitor who had a registered title in his office, who did not pronounce the Register to be a costly nuisance. Put these things together, the heavy expense, the reluctance to produce the title, the fear of failure, the suspicion that the thing is a useless fad, and the unfavourable advice of the family solicitor, and let us ask again how Lord Halsbury can hope that the registration of indefeasible titles will be generally attempted.

Perhaps the hope may be entertained that a middle course will be adopted, and that the people who decline to attempt an indefeasible title may be induced to apply for a 'qualified' one, which may subsequently grow into indefeasibility. It would be no reproach to Lord Halsbury, whose talents and accomplishments

have been displayed upon another field, if he should need to be told that 'qualified titles' are the conveyancer's laughing-stock. One of the greatest among the obstacles to the success of registration, is the universal reluctance of landowners to run the risk of the discovery of flaws in their titles. To apply for registration with a 'qualified title' is the same thing as to step forward with the admission that flaws exist, accompanied by a voluntary statement of their precise nature, and the expression of a desire that they may be recorded in a public document.

The inventor of 'qualified titles' would appear to have imagined that being placed on the Register is like going to Heaven, a thing wholly desirable in itself and requiring no justification from ulterior motives. If, indeed, the desire to be placed on the Register with an indefeasible title were almost universal among landowners and invincibly strong, some no doubt, possibly a good many, might be willing to face the inconvenience of beginning with a qualified title. But the signs of this desire are very faint, and the inconvenience attaching to qualified titles is in practice very serious. The defects which prevent a title from being registered as indefeasible are usually of the sort against which conveyancers guard in conditions of sale by the insertion of 'special conditions.' The object of these special conditions is to preclude the purchaser, when the title is examined, from entering upon certain specified inquiries, and to bind him beforehand to admit the truth of sundry alleged facts as to which the producible evidence is not conclusive. It is not found in practice that special conditions usually have much tendency to depreciate the selling value; and in sales by auction it is notorious that they have no tendency whatever to deter bidders. It is a regular part of the conveyancer's duty, when a purchaser who is eager to complete the purchase agrees to waive objections that have been pointed out, to warn his client that these objections represent defects which, on any future sale, will require to be guarded against by means of special conditions framed to meet them. This device is not open to the vendor of a registered qualified title, the defects in which are specified upon the Register, which will be open to the purchaser's inspection as soon as he has executed the contract; and the vendor cannot avoid stating, when he offers the property for sale, that the title which he is offering is qualified only and not indefeasible. This is eminently calculated to depreciate the value of the property.

Even with regard to indefeasible titles this same inconvenience is liable to make itself felt in practice; because the Register does not in practice work with the automatic smoothness which was expected, nor is there any hope that it will be got to work

smoothly, unless and until people in general are persuaded or compelled to restrict their dealings to mortgages, leases, conveyances in fee simple, and specific devises. So long as more complex dealings, and especially settlements, are permitted, hitches must inevitably occur. The Register will require, so to speak, to be 'brought up to date' at intervals; and it is usually found that, during the interval which has elapsed since the last making up, various things have occurred which require to be put straight, and which place an intending vendor or mortgagor in much the same position, in respect both to the need of 'special conditions' and to the inability to make use of them, as has been above described in the case of qualified titles. The following narrative will serve to illustrate this point, as well as some others. It refers to a title under the Act of 1862; but nothing in the circumstances springs from the provisions of that Act in particular, and they might equally well occur under the Act of 1875, or under Lord Halsbury's Act if it should ever be passed.

Once upon a time, certain persons who were about to be married and were domiciled in Scotland made a settlement, under which somebody, who may be called *A. B.*, was entitled for life to the income of the settled property at the time of the sale hereinafter mentioned. The settlement originally comprised only personalty, but it contained a power for the trustees to invest the trust funds in the purchase of lands situated anywhere in the United Kingdom. This power they exercised by purchasing certain lands in England. These lands were in the first instance conveyed to the tenant for life in fee simple; and by a subsequent deed he conveyed them to the trustees (two in number and both domiciled in Scotland) as joint tenants in fee simple to be held upon the trusts of the settlement. The trustees then procured themselves to be registered under the Act of 1862, with an indefeasible title.

The good people seem not to have known that by so doing they had placed themselves under a definite system, to which they were bound to conform their future proceedings, any departure from which would land them in difficulties. They appear to have been under the impression that some magical process had been successfully performed, which would enable them for the future to do things anyhow and always with the happiest results. They accordingly proceeded to confuse their new title with great success. One of the two trustees died. The survivor, purporting to exercise the powers of the Conveyancing Act of 1881, appointed two new trustees, retired himself from the trusts, and made what purported to be a 'declaration of vesting' of the trust property in the new trustees, under section 34 of that Act. One of these died, and a

new trustee was appointed by the survivor, in similar form and with a like declaration as to vesting the trust property. Notice of all these dealings and proceedings was placed upon the Register. The tenant for life, purporting to act under the powers of the Settled Land Act, 1882, offered the lands in England for sale; and they were sold by private contract. The solicitor for the purchaser accepted the title upon proof that the trustees of the settlement had been placed on the Register with an indefeasible title, and that *A. B.*, the vendor, was under the settlement entitled for his life to receive the income of the lands. He took a conveyance from *A. B.* to his client in fee simple, and hastened to the Registry Office, expecting in the course of a quarter of an hour or thereabouts to place his client's name on the Register with an indefeasible title.

Here a disagreeable surprise awaited him. In the first place he found that the documents relating to the case required to be printed. Having acceded to this, he then learned that several objections existed to the registration of his client's title, chiefly founded upon the form in which the appointments of the new trustees had been made.

It was at this stage that the proceedings came under the notice of the present writer. Sixteen pounds had already been disbursed 'on account' of the costs of the Registry Office, with a fair prospect of considerable additions. There is no need to specify the nature of the objections to the title. These were all such as a willing purchaser might be advised to waive, except one, importing that the legal estate was outstanding. If the title had not been on the Register, this outstanding legal estate would have been got in, which could be done with perfect ease, since the person in whom it was vested was known and was disposed to lend every assistance, and the whole matter would have been begun and ended at a cost which may be estimated at from two to four guineas.

Nothing would be more unjust than to blame the learned Registrar for taking the objections in question: on the contrary, he deserves credit for his vigilance and acumen. He had no right to waive them, as a private purchaser has. Any purchaser would probably in this case have been advised that he might with reasonable safety waive all the objections except that relating to the outstanding legal estate; but the Registrar, as the official guardian of a public record, of which he is bound to maintain the integrity, can take no account of the readiness of willing purchasers to make concessions: which in fact means accepting something less than the standard which the Registrar is, and ought to be, bound to maintain.

This is one of the features of registration which the enthusiasts

of 1862 could not be expected to foresee, and which Lord Halsbury does not appear to have foreseen. Hitches must perpetually occur so long as complex transactions are common and the world at large does not consist of skilful conveyancers; and such hitches are practically more troublesome in the case of registered than of unregistered titles. If, indeed, Lord Westbury, or Lord Cairns, or Lord Halsbury, could have contrived a new kind of Statute of Uses, whereby their respective intellects might be 'executed' for the benefit of the general public, many of the practical difficulties which they have failed to surmount would no doubt be removed.

But, it might possibly be said, if the parties had not delayed the registration until the sale, if the new trustees had applied, directly after the first appointment, to have their own names put upon the Register, their mistake would have been at once detected, and might have been put right with much less trouble and expense. This reply is perhaps true; and it supplies an excellent gauge of the practical knowledge of the persons who would make it. Does Lord Halsbury really contemplate a state of things under which every trifling proceeding relating to a settled estate, such as the appointment of a new trustee, shall be the subject of an application to the Registrar? If he does not, he leaves open the door to the mishaps above exemplified: if he does, his friends may bless his good fortune in having been hitherto saved, against his will, from founding his proposed Institution.

Let the reader imagine the size of a Public Department which is intended to absorb, or rather, to supervise and reproduce in a kind of facsimile, so large a share of the business of all the conveyancers and solicitors in the kingdom; and then let him wonder where the people are to be found to work it. The number of persons who are capable of dealing swiftly, surely, and safely, with the questions referred to, is not infinite. Lord Halsbury, to be sure, is very modest in his requirements, and does not propose to insist upon a high standard in appointing his officials. But it will do little good to commit the general business of the Registry to the hands, for example, which drew up the faulty appointments of trustees above referred to; and can Lord Halsbury seriously hope to get an indefinitely large supply of anything much better in quality? and what does he suppose will ultimately be the consequence of allowing an indefinitely large number of this sort of persons to make any entries they may think proper upon the Register? Lord Halsbury no doubt thinks this inquiry superfluous; but perhaps other noble lords may deem it worthy of serious consideration.

It sounds very nice to talk about buying acres of land as easily as one may now buy pounds of sugar; but the first requisite to

this desirable end must be, that the ordinary dealings with land shall be as simple as the ordinary dealings with sugar. Even if this condition were fulfilled in England, it is doubtful whether the Australian system could be introduced here with the same success as in Australia; because the latter country enjoys two further advantages, of great importance though not so clearly essential. Of these, the first is that, in those sparsely populated countries, where the social divisions between different ranks and grades can hardly (in comparison with England) be said to exist, and where movement and inter-communion are incessant and close, almost everybody knows almost everybody else; and this is a great preventive to fraud, and a great aid to the transaction of business. The second is, that people regard land there with the same feelings as any other article of merchandise, and a particular parcel of the one is no more looked at with special affection than a particular bale of the other. The last circumstance no doubt goes far to account for the rarity of settlements in Australia. In England the opposite feeling is strongly manifested in all grades of society; and where the particular object arouses no personal feeling, it is regarded as a means towards what might be called 'founding a family,' if the circumstances of the parties did not make the use of the phrase ridiculous. Every conveyancer of moderate experience knows that the most signal examples of the hankering after perpetuity are not found in territorial magnates, but in retired tradesmen who have invested their savings in a few suburban houses, or honest yokels who have laboriously acquired a cottage and paddock.

Lord Halsbury, in short, is seeking to force the country to adopt a method of conveyancing which is costly, tedious, and very clumsy in its working, instead of one that is comparatively cheap, expeditious, and far more flexibly adapted to the common needs. The needlessness of the proposed change appears from the evidence of its advocates themselves; for when they come to particulars, and specify the cases which seem to them to demand the new system, these are seen to be of so exceptional a character that they can afford no foundation for a rule. Sir Robert Torrens, for example, who was undoubtedly a man of eminent ability, but who could never understand that the success of registration under one set of conditions in Australia, did not prove that it must succeed in England under a totally different set of conditions, adduced the case of a parcel of land worth £1000, where the 'examination of the title took a year and a half, and cost £300[1].' How many titles does Lord Halsbury suppose to occupy such a time and to cost such

[1] Report of the Select Committee on Land Titles and Transfer, 1878; p. 144, No. 3092.

a sum in their examination? unless, indeed, the object is to place them on the Register, when the figures would be quite normal. Such a case could never occur under the ordinary practice, with regard to lands of such small value, in a transaction between vendor and purchaser or mortgagor and morgagee. In the instance alleged, the object was to cut the land up into building lots, and such great elaboration was employed with a view to getting the thing so thoroughly done once for all, that the numerous subsequent purchasers of the building lots might be satisfied without any examination of the title at all:—as Sir Robert Torrens confesses that they in fact were. He adds, indeed, that if these purchasers had afterwards wanted to sell or mortgage their plots, they would have been obliged to go through the whole frightful experience *de novo;* but in this he was completely mistaken. There is no difficulty at all under the present practice in finding purchasers, and not much in finding mortgagees, who are willing, under such circumstances, to accept the assurance that the previous examination of the title was properly conducted to a satisfactory conclusion, if the matter was carried out by a solicitor of good standing and repute.

What opinion should we be expected to form of the good sense and sobriety of judgment of any one, who either thinks that there is no great hazard in the prosecution of Lord Halsbury's scheme, or else is willing to run the risk for the sake of conferring upon one or two owners of building estates a benefit of which they stand in no need? The promised blessings have already been introduced into the common practice. When any considerable tract of land is to be cut up into building plots, the title is now usually examined once for all by a local solicitor of good standing, and an 'Estate Office' is formed under his management; where purchasers and lessees find a much better imitation of that ideal ease, speed, and cheapness, than any which the authors of schemes of official registration have ever brought to pass hitherto. The opinion is at least plausible, that the experience of the past will be repeated in the future, if Lord Halsbury should be allowed to make the trial. In England, private enterprise has always succeeded much better than, and much better when unfettered by, State interference.

The fate of Lord Halsbury's Bill rests with the House of Lords; and a modest hope is entertained that the foregoing remarks may perhaps enable some among their lordships to obtain a clearer view of the true bearings of the situation than they could gather from the explanations of the Lord Chancellor: who, indeed, necessarily labours under the disadvantage of having no practical acquaintance with the subject. Of one thing their lordships may feel confidently

assured, if the unanimous evidence of everybody who knows anything about the subject can suffice to assure them; namely, that if they should resolve to reject this Bill, or at least the compulsory clauses of it, there will not be the slightest reason why 'the people' should on that account think the House of Lords hostile or indifferent to their interests. When Lord Salisbury last year solemnly warned them that this might be the consequence of their reluctance to swallow Lord Halsbury's nostrum, he was, to use a vernacular expression, talking nonsense: of which he is perhaps now somewhat ashamed, and which he would perhaps not now care to repeat.

H. W. Challis.

THE LAW OF MAINTENANCE AND CHAMPERTY.

THE growth of large railway companies and other powerful trading corporations has in recent years brought into prominence the hardship that may be inflicted upon suitors by the costliness of litigation. It is said that a solicitor acting for a large railway company remarked to an opponent who had successfully sued the company in the County Court, 'By the time we get to the House of Lords you will be sorry that you won this case,' and it is commonly thought that wealthy companies will fight every case, good or bad, in the hope of exhausting their opponent's means before the ultimate tribunal is reached, or at least of deterring others from prosecuting actions against them.

Now our existing law of maintenance and champerty has a serious bearing on this question, for though directed against great evils, this law does undoubtedly tend to deprive the poor of a means of meeting the rich on equal terms in litigation by obtaining the assistance of others who believe in the probable success of their suit. A gratuitous assistance from charitable motives may, it is true, be afforded to another man in the conduct of his cause, but the only kind of assistance which is applicable to all cases or which could become at all general would be one based upon the sound commercial footing of adequate remuneration commensurate to the outlay and risk involved. A solicitor can hardly be expected readily to advance to a needy client the money necessary to prosecute a claim which however honest may possibly fail, with the prospect of losing his money in the event of failure and getting no more than his ordinary costs in the case of success; yet any agreement, however fair, for remuneration dependent on success or varying in proportion to the property recovered is void for champerty. The consequence is that in many cases a poor suitor (not perhaps quite poor enough to sue in formâ pauperis, and even if he were, not able to afford expenses unavoidable even in that case) is either forced to give up all idea of enforcing his right, or is driven into the hands of the hedge-lawyers.

From this point of view it is proposed to review briefly the history of the English law of maintenance and champerty, in order to show against what evils it was originally directed, on what grounds it has since been supported, and how far those evils have become obsolete or those grounds have ceased to be reasonable.

Maintenance (which includes Champerty) is a species of inter-

ference with the course of public justice, of which perjury and tampering with juries are other instances, and is so classed by Blackstone. Its earlier meaning seems to have been almost as wide as, if not wider than, the genus to which it belongs, for according to Lord Coke (Littleton 368 b) it 'signifieth in law a taking in hand, bearing up or upholding of quarrels and sides, to the disturbance or hindrance of common right' and 'is twofold, one in the country, another in the Court,' an instance of the former being the wrongful taking possession of land; indeed in this sense it would seem that every wrongful act is in one aspect an act of maintenance; the latter sort of maintenance (i.e. curialis) included, according to Lord Coke, labouring or intimidating the jury, which is now classed as a distinct offence under the name of 'embracery.'

A definition in the more limited sense in which the word is generally understood, not differing materially from other definitions, is given by Sir J. F. Stephen in his Digest of the Criminal Law:

'Maintenance is the act of assisting the plaintiff in any legal proceeding in which the person giving the assistance has no valuable interest, or in which he acts from any improper motive.'

'Champerty is maintenance in which the motive of the maintainor is an agreement that if the proceeding in which the maintenance takes place succeeds, the subject matter of the suit shall be divided between the plantiff and the maintainor[1].'

Maintenance is an offence by the Common Law (see 2 Coke, Institutes 208, and numerous modern decisions). Bracton, who wrote in the reign of Henry III, about the middle of the thirteenth century and therefore before any of the statutes on the subject, refers to it in a passage cited by Lord Coke and beginning 'De excessibus vic' (i.e. vicecomitum—the sheriffs) 'et aliorum balivorum' (officers) 'si quam litem suscitaverint' etc. Lord Coke also refers to Fleta, Britton, and the Mirror, which were however subsequent to the First Statute of Westminster (3 Edw. I. A.D. 1275) which is the first of a series of statutes dealing with maintenance.

In these books, as well as in the statutes which follow, it is officers of the king or great men who are exclusively or mainly contemplated as committing the offence, and the evil is not the mere fostering of litigation but the perversion or hindrance of justice in the Courts. In the Mirror, for instance, 'Tous ceux

[1] In Bacon's Abridgment there is given a derivation of Champerty from the French 'Champart,' which has an entirely different meaning relating to the division of the produce of the soil between landlord and tenant. Both are of course from 'campi partitio.'

ministers le roy que maintenent faux actions, faux appeales, aut faux defences a exient.'

Champerty was of course *a fortiori* an offence against the Common Law (Coke, ib.).

The Statute of Westminster the First (3 Edw. I. A.D. 1275) is, in the words of Lord Coke, 'the foundation of all the acts and book cases that ensued.' The chapters relevant to this subject are placed among a number of others all directed against oppression by officers of the king, among whom according to Lord Coke the judges were included, whether by disseising a man of his freehold without authority (c. 24), or by taking rewards for performing their duties (c. 26), or by levying black-mail in one way or another, and there are several chapters dealing with the evil influence of these personages in the king's courts. Chapter 25 (translated) is 'No officer of the king by themselves, nor by other, shall maintain pleas suits or matters hanging in the king's courts for lands tenements or other things' (thus not confined to actions relating to land) 'for to have part or profit thereof by covenant made between them, and he that doth shall be punished at the king's pleasure.' This is champerty pure and simple.

Then by chap. 28 it is provided that 'None of the king's clerks, nor of any justicer, from henceforth shall receive the presentment of any church for the which any plea or debate is in the king's court,' and that 'no clerk of any justicer or sheriff take part' (quaere, the original is 'mainteine parties') 'in any quarrels of matters depending in the king's court, nor shall work any fraud whereby common right may be delayed or disturbed,' and then follows the punishment. Chapter 29 deals with deception of the court by any serjeant or pleader or other, which 'unlawfull shifts and devises,' Lord Coke says, were specially common in the cases of great men; chapter 30 treats of the taking of money by subordinate officers of the court; and by chapter 33 'it is provided that no sheriffe shall suffer any barretors or maintainers of quarrels in their shires, neither stewards of great lords nor other (unless he be attorney for his lord) to make suit, nor to give judgments in the counties, nor to pronounce the judgments,' etc., which points to the perversion of justice in the shire courts by powerful maintainers.

The Statute of Westminster the Second (13 Edw. I. A.D. 1285), in chap. 49, contains an absolute prohibition of any purchase of the subject-matter of a suit pendente lite, whether by way of champerty or not, by 'The chancellor, treasurer, justices, nor any of the king's council, no clerk of the chancery, nor of the exchequer, nor of any justice or other officer, nor of any of the king's house, clerk ne lay'; whereas any other person might then have pur-

chased pendente lite, provided the sale was not with a view to the litigation.

Chapter 36 of the same statute deals with a cognate subject, 'Forasmuch as lords of courts and other that keep courts and stewards, intending to grieve their inferiors where they have no lawful mean so to do, procure other to move matters against them' —and imposes heavy penalties.

By the Articuli super Chartas (a statute passed in the year 1300 (28 Edw. I) in order to provide punishments for the infringement of Henry III.'s charters), the scope of the previous statutes is extended to all in a similar position of influence. Chapter 11 begins, 'And further, because the king hath heretofore ordained by statute that none of his ministers shall take no plea for maintenance, by which statute *other officers* were not bounden before this time; the king will, that no officer *nor any other* (for to have part of the thing in plea) shall not take upon him the business that is in suit; nor none upon any such covenant shall give up his right to another'—then follows the penalty, and a proviso, 'but it may not be understood hereby that any person shall be prohibit to have counsel of pleaders, or of learned men in the law for his fee, or of his parents and next friends.' Although this statute applies in terms to all persons, those in office seem to be mainly intended.

There are many other statutes in the fourteenth century upon maintenance and champerty, all of which tell the same story. For instance, 33 Edw. I. stat. 2 (A. D. 1305), called 'Diffinitio de conspiratoribus'—'binding themselves by oath covenant or other alliance falsely to move or maintain pleas'—'and stewards and bailiffs of great lords which by their seignory office or power undertake to maintain or support quarrels pleas or debates for other matters than such as touch the estates of their lords and themselves'; also the so-called 'Statute of Champerty'—of uncertain date, but stated to have been passed under Edward I—which relates that 'Pleaders, apprentices, attornies, stewards, and bailiffs of great men and other of the realm do take to champerty, and by other bargain all manner of plea against all manner of persons, whereby all the realm is much grieved, and both rich and poor troubled in divers manners'—and imposes a penalty of three years' imprisonment and a fine.

Statutes of Edward III. are to the same effect; e.g. 1 Edw. III. stat. 2. 14 (A. D. 1327), 'None of the king's council, house, *or other great or small*, by himself or other, by letter or otherwise, shall maintain quarrels in the country to the lett of the Common Law.' This apparently refers to the maintenance 'in the country' mentioned by Lord Coke, and extends to mere maintenance without

champerty. 20 Edw. III. chap. 4, is to the same effect, and chap. 5 (now repealed) refers to the protection of maintainers by great lords so as to produce injustice 'to the notorious destruction and oppression of our people.' There is a similar statute of Richard II. in the year 1378.

The immediate object of all these statutes seems to have been to impose fresh punishment rather than to create or define the offence, but they show clearly the causes which first produced our statutory law of maintenance.

The chapter in Bishop Stubbs' Constitutional History, entitled 'Social and Political Influences at the close of the Middle Ages,' shows how the nobles, deprived of the power of judging and taxing vassals and of demanding their assistance in private wars, obtained a following by means of an armed retinue, with which they could 'impress the judges,' or could seize on disputed lands and so frighten away a better claimant; the lord would maintain the causes of his followers in the courts, enable them to resist a hostile judgment and delay a hazardous issue; the costliness of litigation was an inducement to the poor to adopt a patron. The sign of this bond was the wearing of the lord's 'livery,' and the 'usage of livery' gave occasion to various statutes in restraint of it, which deal rather with the evils of riotous households than of maintenance and litigiousness. We are told by Bishop Stubbs that 'Livery and maintenance were two of the great sources of mischief for the correction of which the jurisdiction of the Star Chamber was erected in the reign of Henry VII,' and that 'the livery of a great lord was as effective security to a malefactor as was the benefit of clergy to the criminous clerk.'

The legal prohibition of maintenance has been founded in the main on two grounds, injustice and litigiousness; the danger in the one case of the corruption, intimidation, or other perversion of the courts of law; and in the other the public advantage, even with powerful and incorruptible courts, of 'letting sleeping dogs lie,' and of forbearance to claim strict rights, a forbearance which should not be (in the words of an Indian judge) 'artificially disturbed by outsiders,' if the parties interested are in the mood to acquiesce.

In this first period of the history of this branch of the law, the first of these grounds is the main if not the only one; and these statutes which are still unrepealed and operate, by accident as it were, to prevent all maintenance (with some recognised exceptions) and champerty, including such a case of what may be called innocent champerty as has been suggested at the beginning of this article, originated in reasons of public policy wholly inapplicable to the present day.

The remaining statute to be noticed is that of 32 Hen. VIII. c. 9, called by Lord Coke 'a notable statute made in suppression of the causes of unlawful maintenance (which is the most dangerous enemie that justice hath).' The preamble recites that 'the due and just ministration of his' (the King's) 'laws and the true and indifferent trials of such titles and issues as been to be tried according to the laws of this realm,' were 'greatly hindred and letted by Maintenance, Embracery, Champerty, subornation of witnesses, sinister labour, buying of titles and pretenced rights of persons not being in possession; whereupon great perjury hath ensued, and much unquietness, oppression, vexation, troubles, wrongs and disinheritance hath followed'—'to the great hindrance and let of justice within this his realm.' The Act then confirms existing statutes as to Maintenance, Champerty, and Embracery; forbids the buying of pretenced titles or any right or title to land except from a seller in possession, on pain of forfeiture, the meaning of which provision is expounded at some length by Lord Coke (Co. Lit. 368 b); and by sec. 3 enacts 'that no manner of person or persons of what estate, degree, or condition soever he or they be, do hereafter unlawfully maintain, or cause or procure any unlawful maintenance' in any king's court; 'and also that no person . . . do hereafter unlawfully retain, for maintenance of any suit or plea, any person or persons, or embrace any freeholders or jurors, or suborn any witness, by letters, rewards, promises, or by any other sinister labour or means, for to maintain any matter or cause, or to the disturbance or hindrance of justice, or to the procurement or occasion of any manner of perjury by false verdict or otherwise'—on pain of a fine of £10.

As to this, the last of the series of statutes on the subject, Sir J. F. Stephen in his History of the Criminal Law remarks that the character of the offence seems to have changed; 'fraud, perjury and chicanery, have taken the place of violence.' But the tenor of the Act and the offences comprised in it show that it is to the perversion of justice in the courts rather than to the mere disturbance of quietness, that the statute is directed.

The same view is presented by Lord Coke who invariably describes the offence as something 'whereby common right is delayed or disturbed,' or in similar language which would not properly apply to the mere support of another, even for improper motives, in claiming what was his right, but in the public interest were better left unclaimed.

In Blackstone's Commentaries, there is a change in the language used with regard to maintenance generally from that of the old statutes or of Lord Coke. The old evil of the perversion of the

courts is disappearing and in its place is the more newly recognised danger of litigiousness or πολυπραγμοσύνη. After referring (Commentaries, iv. p. 134) to Common Barratry as the offence of 'frequently exciting and stirring up suits and quarrels'—to the statute 12 Geo. II. c. 29 imposing a punishment on anyone practising as an attorney, &c. after conviction of forgery, perjury, subornation of perjury, or common barratry—and to the kindred offence of suing in the name of a fictitious plaintiff, or of one who had not authorised the suit—he speaks of maintenance as 'an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression, and, under the head of 'Champerty,' he says, 'these pests of civil society, that are perpetually endeavouring to disturb the repose of their neighbours and officiously interfering in other men's quarrels even at the hazard of their own fortunes were severely animadverted on by the Roman law,' &c. It might be an interesting inquiry what were the exact considerations which caused the rule to be adopted by the Roman jurists.

From the earliest time certain forms of maintenance were permissible; such were the giving of advice by lawyers for their fees, or by parents and next friends, referred to in the statute of 28 Edw. I; other instances are given in Comyns' Digest, such as father and son paying fees for each other, a master paying fees for his servant out of wages, or a lessor maintaining for his lessee in ejectment, or a mortgagor for his mortgagee; the two last cases, however, might be supported on the ground of actual interest. But on the whole the early decisions show a far stricter view of the law than prevailed later. Some strong cases from the Year Books, all pointing to the overaweing of the courts by powerful maintainers, are cited in Hawkins' Pleas of the Crown; thus it was considered to be maintenance to persuade a man to be counsel for another gratis, or even to go along with a man to inquire of counsel, or to stand by the bar while the trial was going on. This early severity of the law and its gradual modification are referred to by Buller J. in a well-known judgment delivered in 1791 in a case of *Master* v. *Miller* (4 T. R. 340) where he says, 'At one time not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held guilty of maintenance. Nay if he officiously gave evidence it was maintenance; so that he must have had a subpoena or suppress the truth. That such doctrine repugnant to every honest feeling of the human heart should be soon laid aside must be expected. Accordingly a variety of exceptions were soon made; and amongst others it was held that if a person

has any interest in the thing in difference, though on contingency only, he may lawfully maintain an action on it.'

It may be convenient at this point to pursue the subject of maintenance in the specific sense, or 'gratuitous' maintenance as we may perhaps call it, as distinguished from maintenance for a reward (which may or may not be strictly champerty as including an actual share in the property to be recovered).

The exception of 'interest in the thing in difference' has been upheld to the full by modern decisions of the courts, even reasonable belief in a common interest being sufficient to justify maintenance in this sense. So an agreement between proprietors of inclosures to resist a claim for tithes and pay the expenses of litigation in proportion to their holdings, and between manufacturers engaged in one trade to resist a patentee's action for infringement, have been upheld on this ground; similar cases of maintenance of individuals by trade associations, such as the Licensed Victuallers' Association, on matters of general interest to the trade, or by underwriters who are often the real litigants in cases between owners of ships and cargoes, or by the Incorporated Law Society in cases affecting solicitors, and many other instances, are of every-day occurrence; in some cases, again, relating to the custody of infants, where the dispute has been in what religious faith the children should be educated, the costs are often defrayed by charitable friends or religious bodies, and in one recent case by the town council of a borough.

All these cases rest on the ground of a common interest in the subject-matter of the suit. The exceptions of near kindred, master and servant, and charity to a poor neighbour are also well established, and so recently as in 1886 it was held by the Court of Appeal in *Harris* v. *Brisco* (17 Q. B. D. 504) that if the maintainer assisted the third person from charitable motives, believing that he was a poor man oppressed by a rich man, that was a good defence to an action for maintenance, although he made no full inquiry into the circumstances, and if he had done so would have discovered that the poor man had no reasonable or probable ground for the proceedings; it was remarked by Lord Justice Fry in delivering the judgment of the Court that it would be an anachronism to impute to the judges of the reign of Henry VI, on whose decisions reported in the Year Books the law was founded, the modern notion of a discreet and inquiring charity.

In the case of *Findon* v. *Parker* in 1843 (11 M. & W. 682) Lord Abinger said, 'The law of maintenance as I understand it upon the modern constructions is confined to cases where a man improperly and for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defences which they have

no right to make. . . . If a man were to see a poor person in the street oppressed and abused and without the means of obtaining redress, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife and to be guilty of the crime of maintenance.' That was the case before mentioned of proprietors of inclosures joining to resist a claim for tithes. The latter portion of this passage states the old exception to maintenance, the right to assist a poor neighbour out of charity; but the early part seems to indicate as one of the essentials of unlawful maintenance that the person maintained should not have a just claim. It seems clear, on the contrary, from what has already been stated of the law that the support of a stranger (from other than charitable motives) even in a just claim would be maintenance. Lord Abinger himself in an earlier case of *Prosser* v. *Edmonds* in 1835 (1 Y. & C. Exch. 496) says, 'All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to *enforce those rights* which others are not disposed to enforce.' Nor is there any trace in the more recent cases of such a limitation of the rule as is suggested in *Findon* v. *Parker*. There may be a difference between maintenance as a criminal offence and maintenance as an actionable wrong or as ground for invalidating an agreement. The case of *Elborough* v. *Ayres* (L. R. 10 Eq. 367) brings out the exception of master and servant, and also throws light on Lord Abinger's suggestion. There a company maintained their secretary in an action for malicious prosecution against a shareholder in which the secretary recovered £50 damages; the shareholder now sued the directors personally to recover the costs, charges, and expenses to which he had been put by the wrongful maintenance of the action. Vice-Chancellor (afterwards Lord Justice) James was inclined to think that the case came within the exception of master and servant, especially as the trouble arose out of the acts of the servant as such, but he did not actually decide the point. After saying that the course taken by the directors was not unreasonable, and certainly not morally wrong, he remarks, 'the thing must have occurred very commonly in rural life. A country squire, if his gamekeeper and bailiff has been made the subject of proceedings of this kind, brings an action in the name of the gamekeeper or bailiff; and I think many a country gentleman would be very much startled to find that he had been guilty of an offence if he had simply taken up his servant's cause for something which the servant had been exposed to in his service.' If the Vice-Chancellor

had considered it essential to maintenance that the action maintained should be an unjust one, the point would have been disposed of at once by the fact that the action was successful, but there is no allusion to the subject, and it seems to be assumed that but for the relation of master and servant it would have been unlawful maintenance.

The existence of an action for maintenance at common law was disputed and established in the well-known case of *Bradlaugh* v. *Newdegate* in 1883 (14 Q. B. D. 1), where the defendant had set up a man of straw to sue the plaintiff for penalties for sitting and voting as a member of parliament without having made the required oath, and was held liable in damages for so doing; the action for penalties had failed on appeal to the House of Lords, but had succeeded in the Court of Appeal, and therefore presumably cannot be said to have been brought without reasonable cause. The history of the law of maintenance is reviewed in the elaborate judgment of Lord Coleridge, who cites numerous authorities from the year 1797 onwards, but makes no suggestion that the claim maintained must be an unjust one.

The more recent case of *Harris* v. *Brisco* has been referred to already; Wills J. thus states the law and the policy on which it is founded: 'For a stranger to a litigation to embark in it and make it his own is *primâ facie* unlawful, and such conduct requires explanation and justification in order to render it lawful. There is good reason for this, for, if unlimited licence was allowed to litigious and cantankerous people who rejoice in stirring up strife, and to whom an atmosphere of litigation is as the breath of life (and there are such people in the world), to make other people's quarrels their own, and to take the chance of success without incurring the liabilities of failure, a great many persons would be harassed and vexed by unjust and improper litigation;' but neither in his judgment nor in that of the Court of Appeal is it stated that the justice of the claim maintained is a sufficient justification. It may be taken, therefore, whatever Lord Abinger's dictum may mean, that maintenance includes the support of another's claim, whether just or unjust, subject to the recognised exceptions.

The enormous evils that may be produced by maintenance, as well as the impunity with which the offence is often committed, are well illustrated by the great Tichborne case, in which a penniless adventurer put the owners of an estate to an expense of £90,000 in defending themselves against a false claim maintained by outsiders.

Enough has been said upon the question of gratuitous maintenance, which, though it throws considerable light on the question of champerty, is not of great practical importance; for the occur-

rence of such maintenance must be rare, except in the permissible cases that have been mentioned.

The question of champerty, on the other hand, including under that name every kind of maintenance for a reward, whether strictly a share of the 'thing in plea' or not, is of considerable practical importance for the reasons suggested at the beginning of the article; and it is proposed to review shortly the more modern English law on the subject with reference particularly to the questions whether the possibility of an innocent champerty is recognised in English law, and if not, whether it should or can be recognised.

Many of the cases arise in respect of the validity of agreements, either directly involving maintenance or champerty, or indirectly doing so by means of the assignment of the subject-matter of a suit pendente lite, or with a view to litigation; on the latter application of the law of champerty it will be sufficient to say a few words. The strictness of the old law produced the well-known rule against the assignment of a chose in action, on the ground of maintenance, of which Lord Coke—in a note on the non-assignability of a right of reentry in a lease—mentions the reason, 'for so under colour thereof pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed;' many of the statutes quoted contain provisions against the assignment of rights by one not in possession. Buller J. in the judgment which we have already quoted, refers to the history of this old common law rule, showing that even in common law courts it had been made a mere formality, so far as maintenance is concerned, by allowing the assignee to sue in the name of the assignor, and had been constantly repudiated by Courts of Equity, and concludes by saying that 'the maxim was a bad one, and it proceeded on a foundation which fails,' i.e. on the early views as to maintenance which had long since been relaxed. It has been practically abolished by the Judicature Act of 1873.

It is hardly material for the present purpose to discuss in any detail the various questions that have arisen as to the assignment of the subject-matter of a suit, such as the distinction between a sale of an actual interest involving a suit and a sale of a mere right to sue; the case of *Tyson* v. *Jackson* before Sir J. Romilly in 1861 (30 Beavan, 384) seems to go to the extreme limit in allowing the assignment of a mere right of action; there a legatee, too poor to sue, assigned the legacy for less than it was worth to the plaintiff, who bought it for the purpose of enforcing payment by suit; Sir J. Romilly says: 'It really does not bear stating; it has no sort of resemblance to maintenance or champerty.' On the other hand the case of *In re Paris Skating Rink Co.* (5 Ch. D. 959) shows that

the old rule is not entirely dead, for there a winding-up petition was dismissed because the present petitioner had purchased from the original petitioner his debt and the right to proceed with the petition, which was considered by the Court of Appeal to be contrary to public policy.

We now come to the more immediate subject of this article. In the judgment in an Indian case in the Privy Council in 1860 (8 Moo. Ind. App. Cas. 170), there is a passage which occasions some difficulty: 'Maintenance in English law must be something against good policy and justice, something tending to promote unnecessary litigation, something that *in a legal sense* is immoral, and to the constitution of which a bad motive *in the same sense* is necessary.'

It is difficult to reconcile this with the later Privy Council case which will afterwards be referred to, where it was held that an arrangement was consonant with public policy and justice, and at the same time contrary to English, though not to Indian, law; nor does the English law of gratuitous maintenance, as has been seen, contain any such definite qualification of the offence; for although the many recognised exceptions certainly narrow the ground, it may nevertheless be possible to imagine a case where none of the exceptions would apply, and it would therefore be maintenance, and yet there would be nothing in it 'against public policy and justice.' When we look at the cases of champerty—in the wide sense already defined—the passage becomes still harder to understand, for there is no exception (at all events on the ground of being consistent with public policy and morality) to the illegality of champerty or champertous transactions; and the mere fact of champerty is enough in itself to avoid the agreement, which in some cases seems to have been rather in furtherance than in hindrance of 'good policy and justice.'

In some of the cases the question of champerty pure and simple is not fairly raised, because it is mixed up with considerations of undue influence, or of a tendency to produce false evidence. For instance, in *Strachan* v. *Brander*, decided in 1767 (1 Eden, 303), the plaintiff was heir-at-law to a large landowner in Dorsetshire, at the time of whose death intestate he was living in Paris in poverty and obscurity, and totally ignorant of his rights; one Brander, the father of the defendant, found him out, brought him from Paris at his own expense, and promised to support him with purse, credit, and interest against an adverse claimant of the estate. On the approach of the trial of the action Brander and Willis, who acted as attorney, informed the plaintiff that it was necessary to get £1000 for the purposes of the action, and accordingly he executed in favour of various persons advancing the £1000 a bond in

£4000 conditioned for the payment of £2000, with a separate defeasance providing that the bond should be given up if he did not recover the estate; the subscribers in fact risking the loss of £1000 on the chance of winning £2000. Lord Northington held this bond to be, if not strictly champertous, at all events savouring of champerty, and set it aside as against public policy; but it was not a case of mere champerty, as there was evidence of undue influence exercised upon the plaintiff.

So, too, in *Cockell* v. *Taylor*, before Sir J. Romilly in 1851 (15 Beav. 103), the main question was that of undue influence, though the decision that an agreement to lend a suitor £1000 to enable him to prosecute a claim to a fund in Chancery in consideration of his agreeing to buy land from the lender for £6000, which was ten times its value, to be paid on the recovery of the fund, and meanwhile charged upon the fund, was not champertous, seems rather strong. In *Reynell* v. *Sprye*, decided in 1849 (8 Hare, 222; 1 De G. M. & G. 660 & 712), the defendant became acquainted with the title of the plaintiff to some property under a will; and giving himself out as one interested in genealogical studies, he falsely produced in the plaintiff an impression that his interests were precarious, and could not be established without difficulty, delay, and litigation, by which means he induced the plaintiff, in accordance with what he described as 'the usual course among men of business,' to convey to him a moiety of the estate on being indemnified against the costs of recovering the property; there were ample grounds for setting aside such a transaction, apart from any question of maintenance or champerty; indeed Wigram V.C., before whom the case first came, does not rely on any such ground of decision; on appeal Lord Justice Knight-Bruce says: 'The agreement may or may not have amounted strictly in point of law to champerty or maintenance, so as to constitute a punishable offence, but must in my judgment be considered clearly against the policy of the law, clearly mischievous, clearly such as a Court of Equity ought to discourage and relieve against.' He then refers to such persons as the defendant as 'breedbates, barrators, or counsel whom no Inn will own, and solicitors estranged from every roll,' and to the 'traffic of merchandising in quarrels, of huckstering in litigious discord,' an element clearly present in that case, and distinct from that of undue influence, but absent in many cases of what is undoubtedly champerty in law.

In *Stanley* v. *Jones* in the Court of Common Pleas in 1831 (7 Bingham, 369), another aspect of champerty is shown, namely the public danger of its producing perjury or subornation of perjury; so an agreement to communicate information for the purpose

of enabling a person to recover damages in an action, and to exert influence for procuring evidence to substantiate the claim upon condition of receiving a portion of the sum recovered, was held to be illegal; it was argued on the one side that the law of champerty was practically obsolete, having arisen out of a state of society wholly different from the present, and that the agreement was rather in furtherance than in disturbance of right, and on the other side that to uphold such an engagement would be productive of the worst consequences, and joint stock companies might be formed to sue on speculation, and support claims by suborned testimony; the judges thought it was a clear case of champerty, with the additional evil of a direct tendency to pervert the course of justice. Fine distinctions have been drawn in other cases as to agreements to furnish evidence, which it is not necessary to go into here.

If these cases are instances of the evils which are to be avoided, the cases now to follow seem to be on the other side of the boundary line which English legislation should endeavour if possible to draw. In *Strange* v. *Brennan*, before Shadwell V.C., in 1846 (15 Simon, 346), a lady resident in Ireland, who was entitled to a fund in the English Court of Chancery, applied to several Irish solicitors who all declined to undertake the business on the ground of some difficulty in getting the evidence to establish her right to some letters of administration which it was necessary to take out in order to complete her title, and of the expense which would be incurred in taking them out; she however at length induced the plaintiff Strange, a solicitor in Ireland but not in England, to undertake the matter for a commission of 10 per cent. on the sum to be recovered, together with reimbursement of the costs he should pay to a London solicitor. The fund was actually recovered and transferred to the defendant, and the plaintiff now sued on the agreement. The Vice-Chancellor allowed a demurrer to the bill on the short ground that 'the policy of the law is as much opposed to this case as it would have been if Strange himself had been the solicitor employed to do the business.' In this case there was no suggestion of undue influence or unfairness, or of any tendency to pervert the course of justice; and it seems probable that but for the assistance of the plaintiff on the faith of the agreement, the defendant would never have recovered the fund; what is there contrary to justice and good policy in such an arrangement?

Again in *Earle* v. *Hopwood* (30 L. J. C. P. 217), before the Court of Common Pleas in 1861, the declaration stated (in effect) that the defendant being desirous of taking legal proceedings to establish his title to some property by disputing the validity of a will, and being unable to procure the necessary money, requested the plaintiff

to advance it and to act as his attorney in the matter, and it was agreed that in consideration that the plaintiff would advance all sums of money and incur all pecuniary liabilities which should be required to carry on the proceedings, and devote his utmost skill, &c., the defendant, if the proceedings led to his recovery of the property (being unable to pay him in case of failure), would pay to the plaintiff in addition to his legal costs and charges 'a sum of money according to the interest and benefit to the defendant from possession of the estates and property, and sufficient to compensate and reward the plaintiff,' &c.; that the plaintiff did accordingly advance large sums, &c., so that in case of failure he would have lost £5000 beside his costs; and the defendant did in consequence of the proceedings recover the property, which was worth £8000 a year; and the plaintiff claimed a reward of £30,000. On a demurrer, judgment was given for the defendant on the ground of champerty, the contract being within the same principle as if it had been directly for a share in the property. There is nothing there to show that it was anything but a perfectly innocent and proper case of champerty.

Hilton v. *Woods*, before Malins V.C. in 1867 (4 Eq. 432), was a suit for establishing the plaintiff's title to some coal mines. The plaintiff was first informed of his rights by a solicitor, and was at first not willing to insist upon them, but the solicitor induced him to act on a guarantee against costs, in consideration of a share of the property when recovered. It was held of course that such an agreement did not affect the plaintiff's right, but the Vice-Chancellor considered that the agreement was clearly void on the ground of champerty. There was here no perversion of right or justice, but the plaintiff was certainly instigated by the interference of a third party to claim rights which otherwise he would have allowed to sleep; and it is therefore champerty of a less innocent description than in *Strange* v. *Brennan* and *Earle* v. *Hopwood*. The case of *Hutley* v. *Hutley* (L. R. 8 Q. B. 112) should be referred to as clearly marking the distinction between 'gratuitous' maintenance and champerty; there the defendant, the heir-at-law of a testator, agreed with the plaintiff, his cousin, to share half of any property coming to him, in consideration of the plaintiff taking necessary steps to contest the will, and advancing money and obtaining evidence for the purpose and instructing an attorney. The action was brought on this agreement, which was held to be void on the ground of champerty; it was attempted to support the agreement on the grounds of relationship and of a supposed interest, the plaintiff believing that the avoidance of the will would let in an earlier will under which he was entitled. The Court held, first,

that it was clear champerty, the agreement to obtain evidence being especially mischievous; and secondly, that whatever might be the case as to maintenance (i.e. gratuitous maintenance), neither blood-relationship nor a supposed interest made any difference in the case of champerty (though the latter might be a defence in criminal proceedings)—'no amount of collateral interest will justify an agreement to share in the property to be recovered.' But in *Guy* v. *Churchill* (40 Ch. D. 481), Chitty J. considered that an interest sufficient to justify maintenance would also justify champerty, a ground of decision difficult to reconcile with *Hutley* v. *Hutley*.

In *Grell* v. *Levy* (16 C. B. N. S. 73), before the Court of Common Pleas in 1864, an agreement by an attorney to sue for a debt, receiving by way of recompense a moiety of the amount to be recovered, was held void for champerty, its illegality being hardly questioned, the only substantial question being whether it was saved by having been entered into in France, where it was assumed that such an agreement would be valid.

The agreement in that case is treated in the judgments as an infringement of the law regulating the rights and duties of attorneys and clients, an aspect of the question which is also shown in the much earlier case of *Re Masters* (4 Dowl. P. C. 18) in 1835 before the Court of King's Bench where it was held to be no answer to an application to tax an attorney's bill that an agreement had been made that the attorney should receive one-half of the proceeds of a suit carried on at the instance of the client.

In the case of *In Re Attorneys and Solicitors Act*, 1870, before Sir G. Jessel in 1 Ch. D. 573 (1875), there was an agreement by solicitors to investigate and assert the rights of their clients in consideration of receiving 10 per cent. of the net value of the property recovered in addition to their ordinary costs and a charge on the property for the amount; if no property was recovered they were only to receive costs out of pocket with interest at 5 per cent.; the agreement came in question on taxation, the solicitors, in order to make sure of their position, having submitted the matter to the Taxing Master before commencing proceedings. Section 4 of that Act allows of special agreements between solicitors and clients as to remuneration 'either by a gross sum, or by commission or percentage, or by salary or otherwise,' if fair and reasonable; but by sec. 11, which is expressly aimed at champerty, 'Nothing in this Act contained shall be construed to give validity to any purchase by an attorney or solicitor of the interest, or any part of the interest, of his client in any suit action or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action,

stipulates for payment only in the event of success in such suit action or proceeding.' Sir G. Jessel expressed no opinion as to what was 'fair and reasonable' because nothing had yet become payable under the agreement, but for the guidance of the parties he said that the agreement was pure champerty, as it gave to the solicitor, in the event of success, what was equivalent to a tenth part of the property to be recovered, and was therefore within s. 11. In the case of solicitors therefore at all events, champerty *per se*, however reasonable and proper, is sufficient to avoid an agreement.

One other recent case is worth mentioning. In *Bell* v. *Warwick* in L. J. Q. B. 382 (1881) there was an agreement in the following words: 'In consideration of your advancing my solicitors £30 I agree to pay you one-third of the amount of any damages recovered in my action now pending against the London and North Western Railway Company;' in case of failure, there was to be no claim for the £30. Although there was no undertaking to carry on the suit or indemnify for costs, and no evidence of any improper motive, this was held void for champerty, Grove J. remarking, 'It is not for me to express any opinion as to whether it is desirable to keep up the offence of champerty; it suffices that the law still exists.' *James* v. *Kerr* (40 Ch. D. 449) is a still more recent case of champerty before Kay J., which calls for no special remark.

It is clear from these cases that, notwithstanding the above-cited passage from the judgment of the Privy Council in the case in 8 Moore, it is not necessary in order to make an agreement void for champerty or for savouring of champerty that it should be in fact 'against good policy and justice,' nor that it should be 'something tending to promote unnecessary litigation,' unless the bare fact of champerty raises some kind of legal presumption to that effect. For an agreement such as that in *Strange* v. *Brennan* is surely not against good policy and justice but in furtherance of it; it is not to be expected that a solicitor will readily undertake to prosecute a claim involving considerable outlay and, however honest, some risk of failure, when his client is unable to provide money, merely on the chance of getting his ordinary costs in case of success; there is no reward commensurate with the risk incurred.

It is remarkable that we should be able to turn to the law of British India for a recognition of the principle here contended for. For it is in British India that the evils of improper maintenance and champerty have been most rife. Sir J. F. Stephen in his 'History of the Criminal Law,' under the head of 'Maintenance,' says that there 'the invariable result of the establishment of a government strong enough to put an end to open violence was to produce an outbreak of litigation and a regular trade in suits.'

'Speculation in law proceedings,' says Mr. Justice Phear in a reported Indian case, 'has assumed the dimensions and respectability of an ordinary trade; a large class in the community fattens and grows rich on the spoils of needy suitors; and litigation is maintained without reference to the wishes or interests of the nominal parties:' 'it is,' he adds, 'a great game of speculation' which 'takes away all sincerity and truth from the solemn administration of the law.' Mr. Justice Holloway in another case says that maintenance is the favourite instrument for revenging private quarrels; 'a suit against a man's enemy is commenced in the name of another, promoted by the money of the enemy, and sustained by the perjury which he suborns. . . . At the elbow of every man with a grievance, real or imaginary, is one of these unclean animals busily engaged in fanning into a law suit every trifling difference. . . . Sometimes the claimant is taken up either by an individual speculator or by a joint stock company. Having nothing, he is prepared to promise everything. The suit is promoted with their money, and victory leaves the victor and the vanquished together prostrate at the feet of these unholy speculators. The nominal plaintiff is not the "poor man" of Lord Abinger, but the poor neighbour of Quirk, Gammon, and Snap. . . . On the purity of the administration of justice the effect is still more directly pernicious. The unlimited supply of evidence to support any claim true or false, renders it easy for these speculators to produce for the support of any claim, with equal ease whether it be true or false, a body of people called skilled witnesses.' If innocent champerty cannot be permitted without evils of this kind, without in fact letting loose upon society the 'breedbates and barrators' of Lord Justice Knight-Bruce, it would certainly be better to let things remain as they are. But it must be remembered, in the first place, that the evils were, in the words of Holloway J., 'aggravated by the character of the people to an extent of which our own country cannot furnish and never could have furnished an example;' and in the second place Indian judges have not shrunk from the problem of distinguishing between champerty which is and which is not against good policy and justice. After some wavering they have clearly recognised the distinction between the English law of champerty—an absolute and artificial rule founded on the early statutes—and the Indian law, which makes it a question of good policy and justice in each case. This clearly appears in the judgment of the Privy Council in *Chedambara Chetty* v. *Renga Krishna* (L. R. 1 Ind. App. 241), and is well illustrated by the case before the same tribunal of *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (L. R. 2 App. Cas. 186), where the question of champerty was not raised indirectly on the validity of

an agreement but directly by an action for damages representing the costs of an action unsuccessfully 'maintained' against the present plaintiff by the defendant, who as attorney of the person who had brought the former action against the plaintiff, had agreed with his client to carry on the suit in consideration of one-third of the clear net profits. The client was unable to pay the present plaintiff any of the costs of the former suit. Their lordships considered that if the defendant had instigated the suit maliciously and without probable cause that would have been an actionable wrong, but that in this case he had not done so but 'was prompted in what he did by his having formed a favourable and sanguine opinion of the title—and by the hope of a profitable return for his advances,' and in fact two judges did decide in favour of the then plaintiff. After reviewing in detail the Indian cases on maintenance and champerty, their lordships held that it was established that the specific English laws on the subject did not apply to India, having before the acquisition of India become in a great degree inapplicable to the altered state of society and property in England, but nevertheless that contracts of this character ought under certain circumstances to be held to be invalid, as being against public policy. It was held that even if this agreement would have been invalid between the attorney and his client, as being unconscionable, yet it was no punishable offence and created no right of action. In the judgment there occurs a passage which clearly defines the distinction established by the law of India—'A fair agreement to supply funds to carry on a suit in consideration of having a share of the property if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property and no means except the property itself, should be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made not with the *bonâ fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy—effect ought not to be given to them.'

To sum up; it has been shown that the English law of maintenance and champerty is founded on statutes several centuries old which were based on a condition of society now entirely passed away; that (with certain exceptions as regards gratuitous maintenance) the rule is a hard and fast one not dependent on any con-

siderations of justice or public policy; that against certain forms of the offence there exist good reasons of public policy or otherwise, but that in other cases it would be an assistance to justice to allow a champertous agreement; and that in India the distinction between these two cases is recognised by the law, differing in this respect from the law of England.

Without expressing a definite opinion, it is not going too far to say that it is at least a matter worthy of consideration whether the law of England should not be assimilated to that of India by enacting that the mere fact of maintenance or champerty shall not of itself be illegal. The case of *Guy* v. *Churchill* (40 Ch. D. 481), already mentioned, seems to show that in the case of trustees in bankruptcy, i.e. of one special class of poor suitors, the English legislature has already recognised this principle; for Chitty J. there held that an agreement, in itself champertous, by a trustee in bankruptcy selling a right of action in consideration of a share of the sum to be recovered to a creditor who undertook the responsibility of the litigation as trustee for the other creditors, was justified by the Bankruptcy Act 1883 as well as on the ground of interest in the suit.

The dangers of subornation of perjury, or of oppression as between the parties to a champertous agreement, can be dealt with by the law; it would be more difficult to prevent the rise of a regular 'speculation in law-suits'; but of course the court would not enforce any agreement which was against public policy, and such practices might perhaps be checked by allowing only solicitors to enter into these arrangements and by making the maintainer personally responsible for costs. But it would be premature now to discuss the details and consequences of imaginary legislation; it is enough to point out what appears to be an anomaly and injustice in the law.

A. H. Dennis.

STATUTORY CHANGES IN THE DOCTRINE OF CO-SERVICE IN THE UNITED STATES[1].

INTRODUCTORY.—*The General Rule.*—The exemption of an employer from liability for injuries to one of his servants caused by the negligence of a fellow-servant was first recognised in the United States by the Supreme Court of South Carolina in 1841. In 1842, Chief Justice Shaw of Massachusetts decided the leading case of *Farwell* v. *Boston and Albany R. Co.*, which may be said to have settled the common law in this country. The validity of the rule itself, with one exception[2], has never been denied by an American Court. If it has been deemed too harsh and unjust to the employé, the remedy has always been sought in the Legislature. The interpretation to be given to the rule, however, has not been unanimously settled. In several of the States, notably Ohio, Kentucky, Tennessee, Iowa, Nebraska, Missouri and North Carolina, the Courts have endeavored to soften the so-called rigor of the law by adopting what is called the 'Superior servant limitation.' In these jurisdictions, some of them having Courts of great learning, there is recognised a distinction in their relation to their common employer, between servants exercising no supervision over others engaged with them in the same employment, and those who are clothed with the control and management of a distinct department in which their duty is that of direction and superintendence. This limitation is based upon the theory of the presumed presence of the principal in reference to the acts of servants or agents. It deals altogether with the station or position which the two employés occupy, and overlooks the character of the act out of the negligent performance or non-performance of which the injury arose, the only true criterion of fellow-service. However just and more humane this rule may be, as it is claimed by its advocates, there is no escaping the truth that it is an usurpation on the part of the Courts of the prerogatives of the Legislature and is in its fullest sense 'judge-made law.' It appears to the writer to be an erroneous deduction from the language of the earlier reports wherein certain servants are called vice-

[1] Adapted from a work upon The Law of Fellow-Servants (Edward Thompson Company, Northport, N. Y.), by William M. McKinney, Associate Editor of American and English Railroad Cases.

[2] The Scots decision of *Dixon* v. *Rankin*, denying the doctrine of Co-Service, came to the notice of the Supreme Court of Wisconsin in 1860. Relying on this case the Court overruled a former decision, and decided that a master was liable for an injury to one employé caused by the negligence of a co-servant. In the following year, however, this decision was overruled and the general rule re-affirmed. *Moseley* v. *Chamberlain*, 18 Wis. 700.

principals, is founded on false theories, and its systematic and consistent application is impossible. It cannot be a correct rule of law.

In other States the common law doctrine of co-service itself has been so vigorously attacked that the law-making powers have deemed it expedient to do away with it, either partially or altogether. Statutes have been passed in eight States and two Territories. Few of them are of as sweeping a character as the English Act, their application with three exceptions being confined to railway companies. These statutory changes in the law of master and servant began as early as 1855, and at the present time the subject is being agitated in several States where the common-law rule still prevails. It will be the purpose of this article to examine these acts, setting out such portions of them as may be thought proper, as well as the construction which the Courts have placed upon them.

Georgia.—The first State to make any changes in this direction was the Commonwealth of Georgia. This is rather remarkable in view of the fact that at the time the law was amended, 1855, the State was largely agricultural, railroads were exceedingly few, and manufacturing enterprises almost unknown. However, in the year mentioned the Legislature passed the following Acts, which have been incorporated into the Code of 1873 :—

S. 2083. 'Railroad Companies are common carriers and liable as such. As such companies necessarily have many employés who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employés as to passengers for injuries arising from the want of such care and diligence.'

S. 3036. 'If the person injured is himself an employé of the company, and the damage was caused by another employé and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery.'

This means clearly that a recovery is allowed if the damage was caused by another employé and was not caused by the fault or negligence of the employé hurt. If he directly or indirectly caused it, or contributed to it at all, then he cannot recover. But though he had been at fault about something wholly disconnected with the transaction, or was at the time at fault about a matter that had nothing to do with the catastrophe, then he may recover. And such is the law in all the books and all the cases bearing on the point[1]. The Act has been held not to be limited to any class of railway employés[2]. When asked to reconsider its decision to this effect, and

[1] *Central R. Co.* v. *Mitchell*, 63 Ga. 173.
[2] *Thompson* v. *Railway*, 54 Ga. 509.

the point was for the first time made that the Act, if unlimited in its operation, would be unconstitutional, the Court adhered (much on the principle of *Stare decisis*) to its former decision, and also held the law constitutional [1]. The plaintiff in a suit under this Act has no burden to show not only that he himself was blameless, but that the defendant was negligent. 'The moment the plaintiff proves to the jury either, the legal presumption proves the other until rebutted, and the defendant must rebut that presumption [2].'

Iowa.—It was seven years after the passage of the Georgia Act that the agricultural State of Iowa changed the common law. In 1862 the following provisions were enacted:—

'Every corporation operating a railway shall be liable for all damages sustained by any person, including employés of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employés of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employés, when such wrongs are in any manner connected with the use and operation of any railroad on or about which they shall be employed; and no contract which restricts such liability shall be legal and binding [3].'

This change of the rule of the common law, it will be seen, extends no further than to employés engaged in the business of operating railroads, and not to all persons employed by the corporation without regard to their employment. The Legislature had in mind the fact that corporations owning and operating railroads may engage in other business which may be within the scope of the objects of their organisation, yet not at all, or very remotely, connected with the use of their roads. In such cases employés by whom such affairs are conducted acquire no rights under this Act. Their occupation does not expose them to the hazards incident to the use of railways [4]. Accordingly the labor of the Courts has been to determine what employés are connected with the 'use and operation' of a railway. We find a host of decisions upon this point. The following employés have been held entitled to the protection of the Act: A person engaged in working on a bridge and obliged to ride on the company's trains; a section-hand; a hand engaged on a gravel or dirt train; a person temporarily employed as a brakeman by the conductor of a train during the absence of the regular brakeman; an employé injured while riding on a hand car; a private detective injured while walking on the track; a section-hand directed to help unload a train; an employé whose duty it

[1] *Georgia R. Co.* v. *Ivey*, 73 Ga. 499; *Georgia R. Co.* v. *Goldwire*, 56 Ga. 196.
[2] *Savannah &c. R. Co.* v. *Barber*, 71 Ga. 644.
[3] Rev. Code, 1880, s. 1307.
[4] *Schroeder* v. *C. R. & I. R. Co.*, 71 Iowa, 344.

was to assist in loading and unloading gravel cars; a person operating a ditching machine carried on a car; a laborer on a train used for hauling and assisting in loading and unloading the cars. On the other hand, a workman in a railway company's shops; an employé whose duty consists in wiping engines and in opening and closing the doors of a round house; a section hand injured while engaged in loading a car; an employé injured by appliances connected with a round house; employés engaged in elevating coal to a platform to supply an engine; an employé whose duty it is to repair cars while standing on the track, and who was sometimes required to ride on the trains from place to place, and an employé engaged in the work of repairing the track, have been refused compensation for injuries sustained through the negligence of a co-servant.

It is not provided that the negligent and the injured employé shall be co-employés in the same general employment, in the sense that they must be equal in power and authority; all that is required is, that both shall be employés of the corporation. Accordingly an employé who stands in the relation of vice-principal to the men under his control is an employé within the meaning of the Act, and can recover of a railroad company by reason of the negligence of the men selected by himself, and whom he may discharge or retain in his employment as he sees fit[1]. It has also been decided that a receiver who is managing a railway under the direction of the Court is within the Act, and may be charged and a recovery obtained against him, as a person operating a railway[2]. And the fact that a lessee may be held liable under the Act does not prevent recovery against the owner of the road[3]. Like the Georgia Act, the statute does not exonerate the injured party from the necessity of exercising reasonable care[4].

Wyoming.—The Legislature of the territory of Wyoming in 1869 passed the following '*Act to protect railroad employés who are injured while performing their duty:*'—

'Any person in the employment of any railroad company in this Territory who may be killed by any locomotive, car, or other rolling stock, whether in the performance of his duty or otherwise, his widow or heirs may have the same right of action for damages against such company as if said person so killed were not in the employ of said company; any agreement he may have made, whether verbal or written, to hold such company harmless or free from an action for damages in the event of such killing shall be

[1] *Houser* v. *Chicago &c. R. Co.*, 60 Iowa, 230.
[2] *Sloan* v. *Cent. Iowa R. Co.*, 62 Iowa, 728.
[3] *Boxer* v. *Burlington &c. R. Co.*, 42 Iowa, 546.
[4] *Murphy* v. *Chicago &c. R. Co.*, 45 Iowa, 661.

null and void, and shall not be admitted as testimony in behalf of said company in any action for damages which may be brought against them; and any person in the employ of said company who may be injured by any locomotive, car, or other rolling stock of said company, or by other property of said company, shall have his action for damages against said company the same as if he were not in the employ of said company; and no agreement to the contrary shall be admitted as testimony in behalf of said company. Sect. 2. This Act shall take effect from and after its passage [1].'

The Territorial Court of last resort has not, in the twenty years that have elapsed since its passage, been called upon to construe this Act.

Montana.—By imposing on a railroad company the duty of exercising towards its servants the extreme care which it owes to its passengers, the Act of this territory carries the company's liability beyond that imposed by the statutes of any other State or Territory. The Act reads as follows:—

'That in every case the liability of the corporation to a servant or employé acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employé not appointed or controlled by him, as if such a servant or employé were a passenger [2].'

Kansas.—In 1874 the following Act passed the Legislature of Kansas:—

'Every railroad company organised or doing business in this State shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any misunderstanding of its engineers or other employés to any person sustaining such damage.'

This Act has not been given the extended application which its terms seem to warrant. It was adopted from the statute of Iowa, and the judicial construction given to the Act in that State has followed it into Kansas. The maxim *Ita lex scripta est* to the contrary, therefore, it has been held by the Courts to embrace only those persons engaged in the hazardous business of railroading. The care or diligence the Act exacts toward the employé is that degree of diligence which men in general exercise in respect to their own concerns; and contributory negligence of the employé bars a recovery [3]. Notwithstanding the statute provides that every railway company shall be liable for all damages done to any employé in consequence of any negligence of its agents or by any mismanage-

[1] Comp. Laws, Wyoming (1876), p. 512, c. 97, s. 1.
[2] Rev. Stat. 1879, p. 471, s. 318. Enacted in 1873.
[3] *Missouri Pac. R. Co.* v. *Haley*, 25 Kan. 35.

ment of its engineers or other employés, the Court has held that the knowledge or notice, act or omission for which the company is responsible, must be that of some agent or employé having authority or duty in the premises[1].

Wisconsin.—In Wisconsin we find the only State which, after abrogating the common law rule, has returned to it again. The following Act was passed in 1875, and under the pressure brought to bear by the railways was repealed in 1880:—

'Every railroad corporation shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other servant or agent thereof, without contributory negligence on his part, when sustained within this State, or when such agent or servant is a resident of, and his contract of employment was made in this State; and no contract, rule or regulation between any such corporation and any agent or servant shall impair or diminish such liability.'

This Act was held to be constitutional soon after its adoption and not to be limited to those employed in operating railways[2]. Beyond this no important decisions were rendered under it.

Rhode Island.—The Act of this State goes beyond those that we have already considered in that its application is not confined to railways, but embraces all common carriers. It was enacted in 1882:—

'If the life of any person, being a passenger in any stage-coach, or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not, in the care of proprietors of, or common carriers by means of, railroads or steamboats, or the life of any person crossing upon a public highway with reasonable care, shall be lost by reason of the negligence or carelessness of such common carriers, proprietor or proprietors, or by the unfitness or negligence or carelessness of their servants or agents, in this State, such common carriers, proprietor or proprietors, shall be liable to damages for the injury caused by the loss of life of such person, to be recovered by action on the case, for the benefit of the husband or widow and next of kin of the deceased person, one-half thereof to go to the husband or widow, and one-half thereof to the children of the deceased[3].'

The Act applies generally to all common carriers, whether by rail, steamboat, or coach. It extends to carriers by water as well as by land[4].

Alabama.—In 1885 the Legislature of the State of Alabama passed

[1] *Solomon R. Co.* v. *Jones*, 30 Kan. 601.
[2] *Dilberner* v. *Chicago &c. R. Co.*, 54 Wis. 257.
[3] Pub. Stats. 1882, p. 553, c. 204, s. 15.
[4] *Chase* v. *Am. S. Co.*, 10 R. I. 79.

an Act regulating employers' liability for injuries to their employés, which, as far as it goes, is the English 'Employers' Liability Act, 1880,' almost verbatim. It will be unnecessary, therefore, to set out its terms here. In construing this Act it has been the doctrine of the Alabama Courts that, the statute being in derogation of the common law, the inference is that the terms of the Act clearly import the changes intended, and their operation is not enlarged by construction further than may be necessary to effectuate the nearest ends. Notwithstanding, a narrow and restrictive view of the Act is not taken. In its construction the Court considers its objects, has regard to the intentions of the Legislature, and takes a broad view of its provisions, commensurate with the proposed purposes. The statute being a substantial copy of the English Act its enactment by the Legislature in substantially the same language is persuasive of a legislative adoption of the judicial construction of the English Courts. Accordingly we find the Alabama Courts following the English construction wherever it has been permissible. Under the Act the party claiming damages must be an employé at the time of the injury, by contract, express or implied, binding on the defendant; and the injury must be received while rendering the service required by the particular employment or in obeying the order of a superior to which the employé is bound to conform. Injury received while doing other more hazardous service not pertaining to the employment, by way of accommodation or self-assumed, is not sufficient. Where it appeared, therefore, that a night watchman about a station was accustomed to go upon defendant's trains to a distant station for his meals, and, while going thither on a freight train, was asked by the conductor, one of the brakemen being sick, to make a coupling for him, in doing which he was injured; it was adjudged that there was no such employment as brakeman as rendered the company liable [1]. The word 'machinery' has been held not to include a hammer used for driving spikes into cross ties [2]. The Court gave the following definition of machinery: 'A machine is a piece of mechanism which, whether simple or compound, acts by a combination of mechanical parts, which serve to create or apply power, to produce motion, or to increase or regulate the effect.' A recovery has been denied a locomotive engineer under this Act for injuries received by the fall of a trestle, the foundation of which was washed out by an unusually great and destructive flood, it appearing that the trestle was constructed in the manner usual with the best managed railroads, and that it had afforded a safe passage for trains for fifteen years [3]. Negligence

[1] *Georgia Pac. R. Co.* v. *Propst*, 4 So. Rep. 711.
[2] *Georgia Pac. R. Co.* v. *Brooks*, 4 So. Rep. 289.
[3] *Columbus & W. R. Co.* v. *Bridges* (Ala.), 4 So. Rep. 864.

cannot be imputed to a railroad company under the Act from the fact that a locomotive engineer attempted to cross a defective bridge after the safety signal was given, where it appears that the signal was not given from the end of the bridge being approached by the train as required by the rules of the company[1]. Under the section relating to knowledge of defects by the employé, it is held that an employer knowing of a defect or negligence cannot set up that the employé, by continuing in the work, has thereby waived his right to sue for injuries received[2]; also that the absence of contributory negligence need not be set out in the complaint[3].

Minnesota.—The State next in chronological order to amend the law was Minnesota. Chap. 13 of the Laws of 1880 reads as follows:—

'Every railroad corporation owning or operating a railroad in this State shall be liable for all damages sustained by any agent or servant thereof, by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this State, and no contract, rule, or regulation between such corporation and any agent or servant shall impair or diminish such liability: provided that nothing in this Act shall be so construed as to render any railroad company liable for damages sustained by any employé, agent, or servant while engaged in the construction of a new road, or any part thereof, not open to public travel or use.'

Although this Act applies in terms to 'any agent or servant' of a railroad company, yet, by a wonderful process of reasoning, the Supreme Court of Minnesota construed it to apply only to those employés engaged in operating the railroads, and so exposed to the peculiar dangers attending that business[4]. 'We can see why,' say the Court, 'the employer's liability should be greater when the business is that of operating a railroad, but cannot see why one individual or corporation should be held to a rule of liability different from that applied to another, when the employment and its hazards are precisely the same. We cannot illustrate this better than by using an illustration employed by the Supreme Court of Iowa in *Deppe* v. *Railroad Co.*, 36 Iowa, 52: "Suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the landowner employs a like number of persons to cut the timber on a strip of equal length alongside such right of way. If one of each set of employés shall be injured by the negligence of a co-employé, and the railroad

[1] *Columbus & W. R. Co.* v. *Bridges* (Ala.), 5 So. Rep. 864.
[2] *Mobile & B. R. Co.* v. *Holborn* (Ala.), 4 So. Rep. 146.
[3] *Columbus &c. R. Co.* v. *Bradford* (Ala.), 6 So. Rep. 90.
[4] *Lavalle* v. *St. Paul &c. R. Co.* (Minn.), 41 N. W. Rep. 974.

employé can under the statute maintain an action against his employer and the other cannot, then it is clear that the law does not apply upon the same terms to all in the same situation." The Legislature might intend to make such a difference, but it would require unmistakeable terms to make us think so. We do not find such to be the character of the terms used in this statute. That language is rather indicative that it was intended to confine its operation to the case of employés engaged in operating a railroad, and necessarily exposed to the hazards attending that business, and not to take in the case of all employés of a railroad company without regard to the kind of work in which they are engaged.'

Massachusetts.—One of the most complete and comprehensive Acts passed in the United States is in force in the State of Massachusetts. The Act was modelled after the 'Employers' Liability Act, 1880,' yet there are many important differences. It is entitled '*An Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by employés in their service.*' It was passed in the year 1887, and reads as follows:—

'Section 1. Where, after the passage of this Act, personal injury is caused to an employé, who is himself in the exercise of due care and diligence at the time:—

'(1) By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer or of any person in the service of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; or

'(2) By reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence.

'(3) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine or train upon a railroad, the employé, or in case the injury results in death the legal representatives of such employé shall have the same right of compensation and remedies against the employer as if the employé had not been an employé of nor in the service of the employer, nor engaged in its work.

'Section 2. Where an employé is instantly killed, or dies without conscious suffering, as the result of the negligence of an employer, or of the negligence of any person for whose negligence the employer is liable under the provisions of this Act, the widow of the deceased, or in case there is no widow the next of kin, provided that such next of kin were at the time of the death of such employé dependent upon the wages of such employé for support, may maintain an action for damages therefor and may recover in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered.

'Section 3. The amount of compensation receivable under this Act in cases of personal injury shall not exceed the sum of four thousand dollars. In case of death, compensation in lieu thereof may be recovered in not less than five hundred and not more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable; and no action for the recovery of compensation for injury or death under this Act shall be maintained, unless notice of the time, place and cause of injury is given to the employer within thirty days, and the action is commenced within one year, from the occurrence of the accident causing the injury or death. But no notice given under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of injury: provided it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.

'Section 4. Whenever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, or whenever such contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or sub-contract shall not bar the liability of the employer for injuries to the employés of such contractor or sub-contractor, by reason of any defect in the condition of the ways, works, machinery or plant, if they are the property of the employer, or furnished by him, and if such defect arose or had not been discovered or remedied, through the negligence of the employer or of some person entrusted by him with the duty of seeing that they were in proper condition.

'Section 5. An employé or his legal representatives shall not be entitled under this Act to any right of compensation or remedy against his employer in any case where such employé knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had entrusted to him some general superintendence.

'Section 6. Any employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employé for personal injuries for which compensation may be recovered under this Act, or to any relief society formed under chapter two hundred and forty-four of the Acts of the year eighteen hundred and eighty-two, as authorized by chapter one hundred and twenty-five of the Acts of the year eighteen hundred and eighty-six, may prove, in mitigation of the damages recoverable by an employé under this Act, such proportion of the pecuniary benefit which has been received by such employé from any such fund or society on account of such contribution of said employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

'Section 7. This Act shall not apply to injuries caused to domestic servants, or farm laborers, by other fellow employés, and shall take effect on the first day of September, eighteen hundred and eighty-seven.'

There has been but a single decision under this Act. It has been adjudged that the Act does not give a right of action against an employer for the negligence of a fellow-servant in handling or using a machine, tool, or appliance which is itself in proper condition [1].

Contributory negligence.—To entitle the servant to recover under these statutes he must be free from negligence; but the employé is held only to the exercise of ordinary care,—such care as a man of ordinary judgment and prudence would exercise under like circumstances. In Kansas, where the doctrine of comparative negligence is recognised, it is held that in an action against a railway company for personal injuries, brought by an employé, in a case where the company is liable only for ordinary negligence, and not for slight negligence, if the plaintiff himself is guilty of ordinary negligence contributing to the injury he cannot recover if the negligence of the railway company or fellow-employé is merely greater than his; for in this class of cases the plaintiff must have exercised ordinary care, and not have been guilty of ordinary negligence, to sustain his action [2].

Extra-Territorial effect of Acts.—It is established by the weight of authority in the United States that it is not necessary that the law of the State where the right of action accrued, and the law of the forum where it is sought to be enforced, should concur in holding that the act done gave a right of action. The principle is generally held to be the same whether the right of action be *ex contractu* or *ex delicto*. Under this rule the rights acquired under the statutes of one State will always, in comity, be enforced in another State if not against the public policy of the laws of the latter. But it does not follow that because the statute of one State differs from the laws of another State, that therefore it would be held contrary to the policy of the laws of the latter State. To justify a Court in refusing to enforce a right of action which accrued under the law of another State, because against the policy of the laws of the State wherein the Court sits, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of the citizens of such State. A cause of action therefore which accrued

[1] *Ashley* v. *Hart*, 147 Mass. 573.

[2] *Kansas Pac. R. Co.* v. *Peavy*, 29 Kan. 122; see also *McDade* v. *Georgia Pac. R. Co.*, 60 Ga. 119.

in the State of Iowa under the Act of that State has been enforced in the State of Minnesota[1]. The Supreme Court of Wisconsin, however, have not assented to this rule[2]. If the injury occurs in a State where the common law rule prevails, an injured servant who sues in a State where liability is imposed by statute cannot recover under such statute[3].

Constitutionality of Acts.—Most of these Acts are directed especially against railroad companies, but they are not unconstitutional on that account. They do not deprive a railroad company of its property without due process of law, do not deny to it the equal protection of the laws, and are not in conflict with the Fourteenth Amendment to the Constitution of the United States. On this point the Supreme Court of the United States, in examining the validity of the Kansas Act, says, 'The only question for our examination, as the law of 1874 is presented to us in this case, is whether it is in conflict with clauses of the Fourteenth Amendment. The supposed hardship and injustice consist in imputing liability to the company where no personal wrong or negligence is chargeable to it or its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine, and fixes a like liability upon railroad companies where injuries are subsequently suffered by employés, though it may be by the negligence or incompetency of a fellow-servant in the same general employment, and acting under the same immediate direction. That its passage was within the competency of the Legislature we have no doubt. The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws, is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be farther from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. . . . But the hazardous character of the business of operating a railway would seem to call for special

[1] *Herrick* v. *Minneapolis & St. L. R. Co.*, 31 Minn. 11.
[2] *Anderson* v. *Chicago &c. R. Co.*, 37 Wis. 321.
[3] *Atchison &c. R. Co.* v. *Moore*, 29 Kan. 632.

legislation with respect to railroad corporations, having for its object the protection of their employés as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employés and no objections therefore can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the Court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage-coaches and to persons and corporations using steam in manufactories [1].'

Objections to the Iowa, Wisconsin, and Georgia Acts on the same ground have been held unavailing [2].

Contracts in contravention of Statutes.—The Acts of Iowa, Wisconsin, and Wyoming, especially, invalidate any contract releasing the liability imposed upon the employer. In Massachusetts, there existed before the adoption of the Employers' Liability Act a statutory provision prohibiting the limitation by contract of the employer's common-law liability: 'No person or corporation shall by special contract with persons in its employ exempt him or itself from any liability which he or it might otherwise be under to such persons for injuries suffered by them in their employment, and which result from the employer's own negligence or the negligence of other persons in his or its employ.' It is to be presumed that this provision is still effective. Independent of such statutory inhibitions, however, the authorities are conflicting. In Kansas it has been ruled by the Supreme Court that a railroad company cannot contract in advance with its employés for the waiver and release of the statutory liability imposed upon it; and a contract in contravention of such a statute is void and no defence to an action brought by the employé for damages done to him in consequence of the negligence or mismanagement of a co-employé [3]. The Court placed its decision upon the ground that, as the Legislature had satisfactory reasons for changing the rule of the common law, and having adopted the statute for wise and beneficial purposes, a railroad company cannot contract in advance for the release of the statutory liability, for the reason that it would be against public policy for the Courts to sanction contracts made in advance for the release of this liability, especially when the unequal situation of the servant and his employer is considered. 'Take this illus-

[1] *Missouri Pac. R. Co.* v. *Mackey*, 127 U. S. 205.

[2] *Herrick* v. *Minneapolis &c. R. Co.*, 31 Minn. 11; *McAunich* v. *Miss. & M. R. Co.*, 20 Iowa, 338; *Deppe* v. *Chicago &c. R. Co.*, 36 Iowa, 52; *Ditberner* v. *Chicago &c. R. Co.*, 47 Wis. 138; *Georgia R.* v. *Ivey*, 73 Ga. 499.

[3] *Kansas Pac. R. Co.* v. *Peary*, 29 Kan. 122; *Union Pac. R. Co.* v. *Harris*, 33 Kan. 416.

tration,' say the Court: 'In some States—and in our own—the owners of coal mines which are worked by means of shafts are required to make and construct escapement shafts in each mine, for distinct means of ingress and egress for all persons employed or permitted to work in the mines. Such a statute is for the benefit of employés engaged in working in coal mines; but the owner of such a mine would not be permitted to contract in advance with employés for operation of the mine in contravention of the provisions of the statute. The State has such an interest in the lives and limbs of its citizens that it has the power to enact statutes for their protection, and the provisions of such statutes are not to be evaded or waived by contracts in contravention therewith. The general principle deduced from the authorities is that an individual shall not be assisted by the law in enforcing a contract founded upon a breach or violation on his part of its principles or enactments; and this principle is applicable to legislative enactments, and is uniformly true in regard to all statutes made to carry out measures of general policy; and the rule holds equally good if there be no express provision in the statute peremptorily declaring all contracts in violation of its provisions void in regard to statutes intended generally to protect the public interests, or to vindicate public morals.'

But in Georgia the English rule is followed, and it is the law that an express stipulation in a contract of service, such as between a railroad company and a brakeman, that the servant takes all risk incident to his employment, and will not hold his employer liable for injury sustained through negligence, etc. of a fellow-servant, is valid (with the limitation that no one can protect himself from the consequences of criminal negligence), and will be enforced as a bar to an action for damages [1].

Conclusions.—After examining these Acts it cannot escape notice that there has been a great deal too much judicial legislation; that the Legislatures have not completed their work, but have left entirely too much for the Courts. Following upon this we observe that the Courts have, in several instances at least, been imbued with too much of a legislative spirit. They have not shrunk from asking, what is politic, and what is expedient? This leads directly to the assurance that a mere abrogation of the doctrine of co-service is not a settlement of the question. Yet there can be no doubt that if the common-law doctrine is obnoxious, it is far better that the Legislature should abrogate that doctrine or define its limitations, than that the Courts, by strained construction, should endeavour to lessen its effectiveness. It is also the writer's belief that the law-

[1] *Western &c. R. Co.* v. *Bishop*, 50 Ga. 465.

makers of the several States have made a serious mistake in confining this reform legislation to the employés of railway companies. Surely there are other employments as dangerous. Besides, while not coming within constitutional prohibitions against class legislation, it is not creditable to have it savor so much of it. The large majority of the decisions appearing in the Law Reports construing the English Act have concerned employés not connected with railway companies. It is not erroneous to infer from this that relief was needed as much by other classes of employés as it was by those connected with railways.

WILLIAM M. McKINNEY.

THE RIO TINTO CASE IN PARIS.

THE case of *The Rio Tinto Company, the Quebrada Railway Land and Copper Company, Limited, and the Newfoundland Copper Company* versus *The Official Liquidator of the Société Industrielle et Commerciale des Métaux*, recently[1] terminated in Paris, decides a point of French law which cannot fail to be of interest to commercial men all over the world having business relations with France. The issue raised was whether a man can prove in the bankruptcy of another for the loss he sustains by reason of the non-fulfilment of the latter's contracts. The case, shortly put, was as follows. The Rio Tinto Company had contracted to sell, and the Société des Métaux had contracted to buy, 42,000 tons of copper, the delivery of which was to be distributed over a period of three years, from Jan. 1, 1888, at £65 a ton. The contract was punctually performed down to the month of March, 1889. At that moment the Société des Métaux became seriously embarrassed and eventually bankrupt — dragging with it, as will no doubt be remembered, the Comptoir d'Escompte. An official liquidator was nominated by the Paris Tribunal of Commerce on April 15, to wind up its affairs. The Rio Tinto Company, unable to obtain payment for its copper, and declining the offer of the liquidator to deliver it to him and to claim in the bankruptcy for the price, sold it in the market at a loss of about five and twenty pounds a ton, and brought an action against the liquidator to compel him to allow them to rank in the bankruptcy for the difference. The situation of the two other companies above-named was the same with a difference of figures, and the actions were accordingly joined.

The question at issue came before the Tribunal of Commerce of the Seine, I believe for the first time, in 1883, in an action by the Société des Forges de Terre-Noire against the bankrupt Union Générale. The Tribunal dismissed the claim of the Terre-Noire Company, but this decision was reversed by the Paris Court of Appeal, in an exceedingly lucid, learned, and logical judgment of March 4, 1886. Finally, however, the Court of Cassation, the supreme tribunal of the country, quashed the 'arrêt' of the Court of Appeal on Feb. 16, 1887. And as the Tribunal of Commerce, in its recent judgments in the Tamarack[2] and Rio Tinto cases, merely

[1] December 10, 1889.

[2] A precisely similar case, also arising out of the failure of the Société des Métaux. See 'La Loi' of Dec. 11, 1889.

reproduces the arguments of the Court of Cassation, it is to the judgment of that Court that we must look for an explanation of this strange decision.

The Court of Cassation in dismissing the seller's claim to rank in the bankruptcy for the loss he has sustained by the non-fulfilment of the buyer's contract relies on two arguments. Firstly, that articles 576 and 577 of the Code of Commerce which give the seller the right to retain the goods he has contracted to sell to the bankrupt, provided they have not already been actually or constructively delivered, and also the right of stoppage *in transitu*, under conditions similar to those of our own law, but which make no mention of a right to rescind with damages, impliedly exclude any such right. Secondly, that to grant such a right would be unjust to the other creditors, and would disturb the principle of equality between all creditors in a bankruptcy except those who have been expressly favoured by the law.

It is respectfully submitted that this judgment is legally wrong and morally most unjust.

In the first place, it is a fundamental principle of French law that the Civil Code constitutes the common law of the land, and that its principles must be applied whenever they have not been clearly excluded by the other codes. Now, if we refer to the Civil Code, what do we find?

Article 1613 gives the vendor the right of retaining goods sold to a bankrupt buyer. Article 1654 gives him a right to rescind the contract if the seller does not pay the price agreed upon. And article 1184 gives him in addition the right to demand damages. Now, it will be observed that article 577 of the Commercial Code, already referred to, merely reproduces article 1613 of the Civil Code. *But no article in the whole of the Commercial Code either expressly or impliedly negatives in bankruptcy the application of the ordinary rights given to the seller by articles* 1184 *and* 1654 *of the Civil Code.* And this was the view taken by the Court of Appeal in its judgment of March 4, 1886. As for the argument about the equality of creditors, it appears to arise from a confusion of principles. All that is meant by the equality of creditors is that their claims should be paid *pari passu* out of the dividends of the bankruptcy, not that there should be any suppression of those claims themselves. If a man is legally a creditor on general principles, it is monstrous to exclude him from participation in the dividends on the ground that his admission would be prejudicial to the other creditors!

The doctrine of the Supreme Court is the more extraordinary that that Court has already decided[1] that if a seller becomes

[1] February 23, 1858.

bankrupt and fails to deliver the goods he has contracted to sell, the buyer may rescind the contract and obtain damages. It is excessively difficult to see why the converse should not equally hold good. Moreover, article 578 of the Commercial Code gives the trustee of the bankrupt buyer the right to compel the seller to complete the contract on payment of the price agreed on. So that the buyer obtains all the advantages of the transaction, and runs no risk whatever. If he finds the contract unprofitable, there is no means of compelling him to perform it, the seller having no interest in making him a bankrupt since he will not be allowed to claim in the bankruptcy. No other legislation in Europe, I believe, permits so deplorable an injustice. It is unnecessary to cite the provisions of our own Bankruptcy Act, the application of which has the effect of allowing French creditors to claim in an English bankruptcy, whereas English creditors under similar circumstances would be excluded in France. So it is in Austria [1], in Germany [2], and in Switzerland [3].

That it should be otherwise in France, the greatest commercial country of the Continent, whose laws have formed the basis of those of most European nations, is deeply to be regretted. And, unless the decision of the Court of Cassation be speedily modified by the Legislature, its baneful effects will probably be felt ere long in a decided diminution of the commerce of the country.

MALCOLM MCILWRAITH.

[1] Code of 1868, art. 22. [2] Code of Bankruptcy, §§ 15, 16, 21.
[3] Federal Law of Bankruptcy, Art. 213.

THE ANTIQUITIES OF DARTMOOR[1].

THE Society for the preservation of Dartmoor has for some years earned the gratitude of the public by the pains they have taken to protect the ancient crosses, and the standing stones and other prehistoric antiquities still remaining on the great Devonshire uplands. We look forward to the extension of their labours to the conservation of all the hut-circles with their curious beehive houses, or 'ovens' as they are locally called, the cromlechs and 'pounds' of grey moor-stones on the Tors, 'aerias Alpes et Norica castra,' with which the forest abounds. Meanwhile the Association has felt it necessary to undertake the still more pressing task of saving the soil of the moor itself from a continuation of the system of inclosure, which has already cut the ancient forest tract in two, and made unsightly encroachments round its borders. It was stated before the Committee on Commons' Inclosure in 1844, that Dartmoor was the worst common in the United Kingdom for agricultural purposes, though the minerals and granite have always been valuable; but a reference to Rowe's 'Perambulation of Dartmoor' will show that even then great portions of the granitic districts were being brought into cultivation. The naphtha works were established about the same time. A powder manufactory was established near Two Bridges, and a gentleman from Plymouth had erected a dwelling-house, and enclosed 150 acres of land near Arche Tor in the centre of the moor. 'All these measures,' says Mr. Rowe, 'by causing a demand for the wants of an increasing population are gradually bringing the moor within the influence of the properly-conducted industry of man;' and he concludes that the whole tract might be ultimately reclaimed by the erection of hedges and walls, the spread of plantations, and 'the well-directed efforts of an industrious population.' Although the inclosures which have caused most annoyance are for the most part of long standing, there have been many complaints in recent years as to the diversion of old paths, the destruction of pastures by quarrying, and the letting out to companies of the peat-bogs in which

[1] The Dartmoor Preservation Association. A Short History of the rights of common upon the Forest of Dartmoor and the Commons of Devon. The Report of Mr. Stuart A. Moore to the Committee, and Appendix of Documents, with an Introduction by Sir Frederick Pollock, Bart. Plymouth, 1890. [Not published.]

An Exploration of Dartmoor and its Antiquities, with some account of its Borders. By John Lloyd Warden Page. London, 1889.

most of the Devonshire rivers take their rise. Besides these matters, which are all of considerable importance, it should be remembered that the danger of inclosure on a large scale has not entirely passed away. We may observe, particularly, that several of the witnesses before an important Select Committee on Small Holdings appeared to think that a considerable population might even yet be settled within the limits of the ancient forest and upon the great tract of the 'Devonshire Commons' by which it is surrounded. The Forest of Dartmoor forms a wild table-land occupying the centre of Devonshire, and comprising, with the adjacent wastes, about 130,000 acres in extent. Mr. Page has lately published a very interesting work on Dartmoor and its Antiquities, including some of the ancient records of the Forest. It contains several excellent descriptions of the moorlands, from which we will select an old account, written by a Western antiquary, and an extract from an unpublished poem by one of the highest of our legal dignitaries. 'Between the North and the South Hams,' said Tristram Risdon, 'there lieth a chain of hills consisting of a blackish earth, both rockie and heathy, called by a borrowed name of its barrenness Dartmoor: richer in its bowels than in the face thereof, yielding tin and turf which, to save fuel, you would wonder to see how busy the by-dwellers be at some seasons of the year; whose topps and torrs are in the winter covered with a white cap, but in summer the bordering neighbours bring great herds of cattle and flocks of sheep to pasture there. From these hills, or rather mountains, the mother of many rivers, the land declineth either way: witness their divers courses, some of which disburden themselves into the British Ocean, others by long wandering seek the Severn Sea.' In the description taken from the Devonshire eclogue, the great mountain moorland, 'towers up a tract of granite':

> 'The huge hills
> Bear on their broad flanks right into the mists
> Vast sweeps of purple heath and yellow furze.
> It is the home of rivers, and the haunt
> Of great cloud armies, borne on ocean blasts
> Out of the wide Atlantic wilderness—
> Far stretching squadrons with colossal stride
> Marching from peak to peak, or lying down
> Upon the granite beds that crown the heights.'

Mr. Page has given us an account of the old system of 'tin-streaming,' by which the free miners, or 'spalliers' as they were often called, were enabled to set up their tin-bounds in all parts of the moor, subject to the laws and regulations made by the Stannary Parliament sitting at the Moot-hill on Crockern Tor; and he also gives a clear description of the curious Venville or Venwell rights

of the commoners in the neighbourhood of the forest, which are the main subjects of the records now collected and circulated by the Association. The tenants of the parishes bordering on the moor have claimed, ever since their lands were made 'purlieus' of the forest, to take pasture for their flocks and herds, with supplies of turf and stone and 'anything that may do them good' except vert and venison. In consideration of these privileges they became liable to the 'fines villarum' or venville-rents which give the name to their tenure. The tenants owe suit and service at the local Courts, and are liable to be summoned to take part in the 'drifts' which are held at irregular intervals. 'Formerly the practice was to hold two "drifts" in the fall of the year, for bullocks and ponies respectively, and in each of the four quarters into which the forest is divided. On the day appointed the moor-man for each quarter gives notice to the inhabitants of parishes lying in venville, and to others whom it may concern, to collect the cattle or ponies, as the case may be, and drive them to some spot appropriated to that particular quarter where they may be claimed by the tenants. There is no direct payment to the Duchy, but the moor-man who farms the quarter gets so much per head.' Mr. Page points out that a good deal of further information on this interesting subject will be found in a paper by Mr. W. F. Collier, published in the Transactions of the Devon Association, vol. xix, entitled Venville Rights on Dartmoor. The volume now issued by the Dartmoor Association contains a short history of the rights of common upon the forest and the 'Commons of Devonshire,' by Mr. Perceval Birkett, who has taken so great a part in the proceedings of the Commons Preservation Society. He appears to be especially successful in his proof that the 'venville' payment is a rent, and not a fine in the modern sense of the word paid as a compensation for trespass or wrong-doing, and the fact that the right of common exists in respect of tenancies, and not as a consequence of the money payments, is brought out very clearly in his argument. After a careful analysis of the documents appended to Mr. Stuart Moore's preliminary report upon Dartmoor, he concludes that the venville tenants are the owners and occupiers of lands in respect of which venville-rents have been received by the Duchy of Cornwall. 'In some cases,' he adds, 'these rents are paid by the overseers of the poor in respect of the whole of the land in the parish: in other cases by the tenants of specific farms, manors, or vills.' In the next place he considers that the owners and occupiers of the freehold and copyhold lands held of the Manor of Lydford and of the ancient tenements within the forest appear to be entitled to the same or similar rights He has also arrived at the conclusion, on the documents before him,

that all the landowners in the county of Devon, 'except Barnstaple and Totnes,' have similar rights of pasture for their commonable beasts upon the commons of Devon without payment, and upon the forest of Dartmoor upon payment of certain customary fees to the Duchy. Without dealing with the legal aspect of the case presented by Mr. Stuart Moore in his interesting report, and by Mr. Birkett in his summary of the evidence, we may observe that the volume before us contains many incidental notices of matters of customary law which are of high importance to the students of legal history. The reader should refer to Sir Frederick Pollock's valuable Introduction for a notice of 'the abnormal fashion' in which the remnants of forestal jurisdiction have become annexed to the Manor or reputed Manor of Lydford. 'It is not easy to define the true nature of the courts now held at Princetown, but certainly they are neither forest courts nor ordinary manorial courts.' A true forest court may have been held for Dartmoor in very ancient times; but when a grant was made to Richard Earl of Cornwall in 1239 of 'all that our Manor of Lydford with the castle of the same place and all its appurtenances together with the Forest of Dartmoor and all its appurtenances,' the royal forest became converted at law into a Free Chace, and it ceased to be possible to hold a regular Swayn-mote or a Court of Attachment or Justice Seat.

The Earls of Cornwall, we are told, 'in order to keep up their dignity and power over the moor,' held some kind of Chace Court at Lydford at which the business of the borough manor and moor was conducted. The great variety of names under which these Courts were held casts some doubt on the legal existence of a true manor of Lydford, and renders it difficult to support the contention that the whole moor formed part of the waste of such a manor. The Court, as far as it dealt with Dartmoor, appears to have been usually styled a *Curia Legalis*. At this court the 'foresters' of the different wards attended and made presentments relating to the Chace, other presentments being made by the reeve and homage for the borough and by juries for matters especially affecting the manor or inquirable at the Court Leet. The nature of the Court may be illustrated by a reference to the case of *James* v. *Tutney*, Cro. Car. 497, where it appeared that Sir John Stowell was lord of a manor containing a great waste called King's Moor, and that he and his predecessors from time immemorial had held a Court for the better ordering of the common at which the commoners were bound to appear by custom, and a homage was sworn by the steward and by-laws and ordinances were made concerning the common; and this Court, according to the entry preserved in Rolls' Abridgment, was known as *Curia Legalis*. Among other legal curiosities appearing

in the history of Dartmoor we may notice the tenure of Geoffrey Albemarle, who held the little manor or 'manerettum' of Loston *in capite* by serjeanty, rendering to the king as often as he should hunt in the forest of Dartmoor one loaf of oat-bread of the value of half a farthing and three barbed arrows feathered with peacock's feathers and fixed in the loaf. Another interesting tenure arose under the ancient custom of 'land-yoke' or 'land-bote,' whereby the owners of thirty-five ancient tenements in the forest had liberty to enclose eight acres of the waste or forest-ground under the name of a new-take, paying 1*s.* per annum as rent, and holding the new-take 'by copy of the court-roll of Her Majesty's Castle Court of Lydford under the seal of the said court by the steward there for the time being.' We may observe that, according to the west-country usage, the heriot is a 'farlieu' and the deer-leaps in the fences near the forest are variously known as 'leap-yates' or 'lidiates.' A new enclosure from the waste is sometimes called a 'clawe' of land, which may be the same as a close. One would like to have had more explanation of the term 'preda,' which, perhaps, should be written 'preherda,' and of the exact duties of the preherdarii or 'prioures' of Dartmoor in relation to the agistment of cattle, and of the customs of 'mort-gable' and 'water-fall,' which appear in some of the older court-rolls. On the whole, however, we may agree with Sir Frederick Pollock that we have here an unusually rich collection of materials, 'telling a story which is consistent throughout, and fails to be plain only because it refers back to a still remoter antiquity.' Some points will, no doubt, remain obscure, while others which seem doubtful now might be cleared up if we had fuller information about the records. Sir Frederick Pollock is probably correct in saying that the archives of the Duchy of Cornwall are likely to contribute information of great interest and value. Every one will agree with him as to the expediency of 'friendly and concerted action' with the Duchy for the better government of Dartmoor. 'Such an issue is earnestly to be desired on all accounts, and if a just and satisfactory scheme can be established, we may also hope that H. R. H. the Duke of Cornwall and his Council may then deem it prudent to place within the reach of scholars whatever documents affording further authority for the earlier history of Dartmoor may be extant in their possession.'

C. Elton.

REVIEWS AND NOTICES.

[**Short notices do not necessarily exclude fuller review hereafter.**]

Elements of International Law. By Henry Wheaton. Third English Edition. Edited, with Notes, &c., by A. C. Boyd. London: Stevens & Sons. 1889. La. 8vo. xx and 846 pp.

This is a handsome and useful edition of a standard work. The position so rapidly attained and so long maintained by Wheaton's 'Elements' is to be accounted for, partly by the date of its appearance, partly by its intrinsic merits. In 1836 there was no systematic work upon International Law in the English language. The author was also in many respects singularly well qualified for the task which he had undertaken. To early European travel he had added legal training as reporter of the Supreme Court, and actual diplomatic experience at Copenhagen and Berlin. He wrote with the authority of one who had taken part in many of the negotiations to which he had occasion to refer, and in a style which happily combined the precision of a lawyer with the ease of a man of the world. While well acquainted with the treatises of legal theorists, he was guaranteed by an intimate knowledge of foreign politics, and by a large measure of American common sense, against being imposed upon by arguments *a priori*. On the other hand, Wheaton had formed no independent conception of his subject. He borrowed, and spoiled in the borrowing, the unsatisfactory arrangement of Klüber. He is devoid of any sense of proportion, discussing at unnecessary length small points which happened to have arisen in his own experience, devoting for instance no less than twelve pages to the question whether the furniture of an ambassador is liable to seizure for breach of a covenant in the lease of his hotel. He realizes so imperfectly the boundaries of his subject as to include within it the Conflict of Laws.

With all its faults, the 'Elements' is a work which should not be allowed to go out of print, and it has been fortunate in its editors. The commentary in which Mr. Beach Lawrence almost buried the text contains much important matter; and the concise notes of Mr. Dana are models of good sense. Mr. Boyd is a worthy follower of his Transatlantic predecessors. His footnotes, which are clearly distinguishable from those of Wheaton, are always to the point and up to date, though here and there they may need correction; as, for instance, is the case with a note on the rights of legation now possessed by the States of Germany. His larger additions are conveniently inserted in the text, as supplementary sections, but in a type which prevents them from being confused with the original work. It is however to be regretted that Mr. Boyd has thought himself at liberty, and that without notice to the reader, to omit or modify portions of Wheaton's text. This is notably the case in his treatment of Wheaton's account of the German Bund. One of the inconveniences of the reissue of partially obsolete works is that an editor is tempted, in the interests of edification, to tamper with his author. Regarding Wheaton's chapter on the Conflict of Laws as an excrescence, we cannot help also regretting the insertion of a supplementary chapter on that subject, valuable as it is in itself, which has been contributed by Mr. Nelson.

T. E. Holland.

A Treatise on the law relating to Executors and Administrators. By Simon G. Croswell. Boston: Little, Brown & Co. 1889. La. 8vo. lx and 793 pp.

Upon this subject we have, of a sudden, two entirely new books,—one a large work in two volumes, learned and exhaustive, by an experienced judge of probate, Mr. Woerner, of St. Louis, and this one in a single volume of orthodox size. Nor has the author of the smaller work any cause for shame in the comparison inevitable; for he set for himself a different task, and that he has done in a manner much above the average. If the several topics have not in all cases been elaborated, or even presented as fully sometimes as might be desired, they have been set forth clearly and well, and in good proportion; and as an earnest of what the author may further be expected to do, this raises one's expectations.

The first chapter (on Jurisdiction) is one of great interest in the United States and elsewhere, and is well done. It seems to show that one of the serious dangers of a federative system of many 'sovereign' States—no other word but 'sovereign' so nearly expresses the idea, even though that expresses a little too much—is likely to be reduced to small proportions, among a people nearly homogeneous and living under like conditions; the danger, that is to say, of seriously divergent laws. For Mr. Croswell's chapter on Jurisdiction shows that, whereas there was formerly great and often perplexing diversity of statute and of judicial construction, that has been steadily growing less, till now the state of the law may be considered as almost satisfactory. And, what is more, it may be added, without taking any unduly optimistic view, that this particular case is not entirely exceptional.

Has not Mr. Croswell, however, pinned his faith a little too strongly to certain rather sweeping declarations of the Courts in this matter of jurisdiction, in a legal as distinguished from the political point of view? Can it be true, even though able judges have so declared, that a decision in probate, in any case, can be conclusive of the Court's jurisdiction? Suppose, in the interesting New Jersey case quoted by Mr. Croswell, *Plume* v. *Howard Sav. Inst.*, 46 N. J. 211, the priest whose estate had been administered as the estate of a decedent—he had not been heard from for more than seven years, and there was some evidence that he had died long before in a distant State—should turn up in New Jersey some fine day and bring trespass against his 'administrator'; how much would the decision of the Chief Justice, that the decree in probate appointing an administrator of his estate was conclusive of the priest's death, amount to? Or would the Court say, with the French Court in the case of de la Pivardière, that if he was not dead and buried he ought to be, and decline to hear him? The truth appears to be, that the reason why, after the Probate Court, having jurisdiction of the *res*, has appointed an administrator or executor, judges refuse to hear evidence (if they do) that the supposed decedent is still living, is that the best evidence of the fact, the man himself, is not produced.

Another chapter to which we turned with interest was the short one on Acceptance or Renunciation of the trust; and we were not disappointed. In half a dozen terse sections the gist of the matter is stated, and that too with regard to not a few special American statutes.

The chapter on Foreign and Intestate Administration is however the one of most general interest. This, as one would have reason to expect, if not to require, is fuller than most other chapters. It occupies twenty-seven

pages, and goes over the whole ground, in its general and in many special aspects. Among other things which one will look for there, and find, is the rather perplexing subject as yet of statutory rights of action for the negligent killing of the testator or intestate, where the laws of different States are involved. This part of the chapter would bear enlargement. It was not necessary to explain the title of this chapter to American lawyers; but we fancy that a section or two at the beginning, devoted specifically to explaining any differences between the probate of a will abroad and the probate of a will in a sister State, might be useful beyond the United States; though the differences may be gathered from what is said in various parts of the chapter.

We have not examined the whole or even the greater part of Mr. Croswell's book; but so far as the examination has been made, it has been satisfactory, and, assuming that all is as good as what we have seen, the book is likely to prove a success. It is evidently done at first hand, except the history; that Mr. Croswell will not long be content to take from Swinburne, Blackstone, or even Coke (how odd it sounds to read of the *probate* of wills before the Conquest and in the time of the Conqueror!); and it is well written.

When Mr. Croswell reaches his second edition, he may think it proper to notice the striking judgment of Mr. Justice Holmes in *Brigham* v. *Fayerweather*, 140 Mass. 411, and of the Court of Appeal and House of Lords in *De Mora* v. *Concha*, 29 Ch. D. 268; *S. C. nom. Concha* v. *Concha*, 11 App. Cas. 541, on the effect of decrees in probate in regard to special findings of the Court.

There is another point we hope to receive light in regard to, in the next edition, and that is as to the meaning of such expressions, touching the decree, as 'conclusive in the absence of fraud.' What does 'fraud' mean there? There is a great deal of loose talk in the books on that matter, and the Courts have found not a little difficulty in dealing with it. Mr. Croswell is familiar with the probate cases on the subject, but the question is a wider one than that; and such cases as *Engstrom* v. *Sherburne*, 137 Mass. 162, and *Spencer* v. *Vigneaux*, 20 Cal. 442, apparently *contra*, and *Flower* v. *Lloyd*, 10 Ch. Div. 327, *ac. Castrique* v. *Behrens*, 3 El. & B. 709, and *Abouloff* v. *Oppenheimer*, 10 Q. B. Div. 295, *contra*, though not probate cases, should be considered. For they have answers to give, however discordant. B.

Bythewood and Jarman's System of Conveyancing. A Selection of Precedents in Conveyancing taken from Modern Manuscript Collections and Drafts of Actual Practice, with Dissertations and Practical Notes. By the late W. M. Bythewood, Thomas Jarman, and George Sweet. Fourth edition. By Leopold George Gordon Robbins. London: H. Sweet & Sons. 1884 to 1890. Vol. I, lii and 891 pp.; Vol. II, lvi and 1072 pp.; Vol. III, lxx and 1359 pp.; Vol. IV, lii and 1058 pp.; Vol. V, xlii and 733 pp.; Vol. VI, xlviii and 962 pp.; Vol. VII, lxxx and 1135 pp.

The edition of this book by the late Mr. George Sweet, completed in 1850 with the exception of the volume on Settlements, has always been considered a very excellent work. Owing to the lapse of time since that edition was published, the precedents in it are not adapted to the existing law, and the dissertations in it contain much matter that is obsolete. Notwithstanding these objections to using the book, we believe that it is still sometimes

resorted to in cases of difficulty even by conveyancers in considerable practice.

The present edition has been prepared with much care by the editor; the dissertations will, though they are naturally somewhat unequal in quality, be found most useful, and will probably occupy the same position in the library of a conveyancer that the dissertations in the former editions occupied at the time of their publication. This is, and it is intended to be, very high praise. For example, the dissertation on 'Purchase deeds of Freeholds,' vol. v. p. 2, &c., is a most admirable epitome of the law; so full as to be worthy of the perusal of the conveyancer in full practice, so clear as to be useful to a student preparing for an examination. In this volume the editor raises at p. 526 a curious question, whether it is now necessary to insert 'general words' and the 'estate clause' in a charter of feoffment. As other examples of very useful dissertations the reader may peruse 'Enfranchisement of Copyholds' in vol. ii, and 'Mortmain' in vol. iv. Some useful information as to Sales by Corporations will be found in the dissertation on 'Purchase Deeds,' vol. v. p. 59, *et seq.*

The forms used in most instruments are now so well settled that there is but little scope for the ingenuity of the draftsman in framing precedents for ordinary use. All that he can do is to indicate which of known forms are in his opinion the best, and in some few cases to devise forms to meet difficulties which to his knowledge have occurred in practice.

The editor has a tendency, most pardonable in a conveyancer, to reject some variations in the common forms which have been suggested of late years. For instance, in the typical form (vol. vi. p. 547) of the hotchpot clause in a marriage settlement containing a covenant for the settlement of the wife's after-acquired property, he restricts the operation of the clause to 'the said trust fund.' See as to this 3 Dav. Prec., 3rd ed. p. 170; 2 Vaizey on Settlements, 1223. In the settlement of the proceeds of sale of real estate he does not insert power to value the unsold land for the purpose of giving effect to the advancement and hotchpot clauses. In the Name and Arms clause he adopts the form contained in most collections of precedents, but, we believe, very commonly and properly objected to in practice, which enables a husband, by discontinuing the user of the prescribed name and arms, to cause his wife to forfeit her estate.

It must not, however, be thought that the editor has neglected some of the questions that the old forms did not provide for. For instance, in the covenant to settle a wife's after-acquired property he has inserted a provision which, though often used in practice, has not to our knowledge hitherto appeared in print, excepting from the operation of the covenant, 'Any property as to which the donor, testator, or settlor from whom the same shall be acquired shall indicate an intention that the same shall not fall under the operation of such an agreement or stipulation as this present agreement.' This provision ought in our opinion always to be inserted, as in its absence it is impossible to make any gift exceeding the prescribed amount to the wife, so that she shall have the personal enjoyment of it. At vol. vii. p. 992 the editor inserts a provision directing legacies, &c. to be paid primarily out of the proceeds of the conversion of per-onalty under a will, the scheme of which is to make a mixed fund of the proceeds of the sale of realty and personalty, so as to avoid expensive valuations of realty, owing to the operation of the Customs and Inland Revenue Act, 1888.

The 'Special Instruments,' vol. vi. p. 803 *et seq.*, contains some very useful precedents, some of which will not, so far as we are aware, be found elsewhere.

Both the dissertations and the precedents are well indexed in each volume. The only fault that we have to find is that the editor did not publish, with the last volume, addenda to the dissertations in the earlier volumes containing cases decided since those volumes were published.

H. W. E.

Bell's Dictionary and Digest of the Law of Scotland. Seventh Edition. By GEORGE WATSON. Edinburgh: Bell & Bradfute. 1890. La. 8vo. vii and 1138 pp.

THE work known as Bell's (Scotch Law) Dictionary is not reckoned amongst the works of the great Professor, George Joseph Bell, though it is said to have been projected by him. The four editions of 1807, 1815, 1827, and 1838, were compiled and edited successively by Robert Bell, W. S., and William Bell, Advocate—names not to be found in Mr. Leslie Stephen's Dictionary, and whom it would be rash to identify upon any less trustworthy authority. In the course of these four editions the work, from little more than a glossary—or short and popular explanation—of Scotch law terms, became a compendium of Scotch Law, arranged in alphabetical order. Although not in itself an authority in the sense in which Erskine's Institutes, or Professor Bell's Commentaries, are regarded as such, the Dictionary and Digest has been most useful in practice as a ready guide to these and other leading authorities; and as containing information often enabling the practitioner, in the hurry of business, to dispense with further search. The fifth edition, that of 1861, was by Professor Ross.

In the present issue, the editor has gone back to the edition of 1838 as the groundwork of the text, placing all matter not substantially contained in that edition in square brackets. This arrangement has the advantage of placing at once in contrast the law of fifty years ago with the present. It is almost surprising to find how much of the work of 1838 remains unaltered. The modern additions often consist of illustrations from modern cases which only prove the soundness of the original text.

Under 'Criminal Prosecution' the changes made by the Criminal Procedure Act, 1887, have been carefully worked in; and this article furnishes an excellent account in brief of the method by which an accusation of crime is investigated and finally tried.

Under the head of 'Election Law,' a valuable account of the old election law before 1832 has been retained entire, and the whole subject treated in clear historical order.

A new feature of this edition is the more frequent introduction of headings belonging exclusively to English law, with a brief explanation sufficient to render them intelligible to Scotch lawyers. This, however, it must be confessed, is done in a somewhat perfunctory manner. For instance, under the heading 'Purchase,' this word—in the technical sense rendered classical by Shakespeare in the last words addressed by Henry IV to his son—is explained in a brief paragraph, with a reference to Sweet's Law Dictionary.

It would have been appropriate under this heading to have referred to cases (such as *Leny*, 22 D. 1272) where the distinction indicated by the English word 'purchase' is given effect to in Scotch law. The distinction is indeed not less marked in Scotch than in English law. But it has been obscured by the want of a convenient equivalent to the word 'purchase;' and the line of demarcation has been shifted by the Entail Act of 1685, confirming what must have been, at that time, the very questionable attempt

of conveyancers to attach the effect of a gift by *purchase* to a destination to 'heirs' of a special class. It remained however a settled principle, even in Scotch law, that a gift to 'heirs whatsoever' could not be protected by the fetters of an entail; and it is now equally well settled that the same applies to a gift to 'heirs,' unless the context makes it necessary to construe the word as confined to a *special class of heirs*. Now, if it were allowed to borrow the word 'purchase' from the English law, the reason of all this might be summed up briefly as follows:—'"Heirs" cannot, except by a necessity of the context, be construed as *a word of purchase*;'—a proposition which an English lawyer would think a truism; though so great an authority in Scotch Conveyancing as the late Lord Curriehill, never fully assented to the principle as applied to Scotch Law in the cases above referred to. R. C.

System des Handelsrechts mit Einschluss des Wechsel-, See- und Versicherungsrechts im Grundriss. Von L. Goldschmidt. Second Edition. Stuttgart: F. Enke. 1889. 8vo. 248 pp.

The first edition of this work gave a ground-plan of the arrangement of the subject with references to the literature belonging to each separate head, the second adds detailed notes on some of the matters referred to. The book is primarily intended as a help to University teachers, but it will be found most valuable for several other purposes. For English readers its chief use will consist in the elaborate bibliographical information it contains. The number of monographs published in Germany either separately or in periodicals on almost every branch of mercantile law is so great that the student's path becomes blocked up if he is left to his own devices, and a guidance so discriminating and so reliable in every way as that of Professor Goldschmidt is therefore most welcome. The subjects referred to are very numerous, the book dealing with mercantile law in its widest sense, and including many subjects of international interest, such as the law of bills of exchange, maritime law, insurance law, banking law, the law of carriers, the law relating to publishers, the law relating to money and to money securities, &c., &c. The literature of other countries as well as that of Germany is given with great completeness. The references to English and American publications are on the whole very exhaustive, and show great care and discrimination. The only serious omission we have been able to discover is the absence of the works of Lord Justice Lindley and of Mr. Buckley from the list of books on English company law, and we may also point out that a work on 'les sociétés anglaises limited' does not profess to deal with the law of partnership. But these are solitary exceptions. Otherwise not only the right books, but also the latest editions, are quoted, and we may well assume that the same care and knowledge has been applied in the case of the literature of other countries. It is almost needless to add that a book coming from a man so distinguished as a historical scholar as Professor Goldschmidt contains ample references to mediaeval mercantile law, and this fact may also attract English students. E. S.

Überblick über die Geschichte der französischen, normannischen und englischen Rechtsquellen. Von Heinrich Brunner. Leipzig: Duncker & Humblot. 1889.

In revising for the new edition of Holtzendorff's Encyklopädie his well-known sketch of French, Norman, and English legal history, Dr. Brunner,

as might be expected of him, has shown that he does not overlook new books or new discoveries. On the present occasion he has been able to use some of the as yet unpublished results of Dr. Liebermann's researches among our oldest law books. The most important item of news is some information about the lost law book of the twelfth century, of which tidings were first published in that odd jumble of notes known as 'Cooper on the Public Records'—we call it an odd jumble, for whether a particular note comes from Cooper himself, or from Palgrave, or from Hardy, the reader can never discover. It was known that the missing book consisted of four parts, and Liebermann proposes to call it the Quadripartitus. The first part, it now appears, consisted of a Latin version of the Anglo-Saxon laws, and the third part (we should hardly have expected this) of the Ordo Judiciorum which became known as 'Ulpianus de edendo.' Of the fourth book, which treated 'de furto et partibus ejus,' no portion has yet been found. The third book seems to have been a collection of state papers of Henry I's day. Certainly the little that has as yet been revealed will make us wish for more.

One other point in Dr. Brunner's sketch well worth the notice of Englishmen is the panegyric—for we can call it nothing else—that he pronounces on Blackstone's work, a deliberate and carefully weighed judgment, which none the less is a panegyric. On the other hand, the half-line given to 'die naturrechtlichen Theorien Benthams und Austins' may strike some of us as strange. In a recent biography of Austin complaint was made that 'his name is not found in such a work as Holtzendorff's Rechts-Lexicon, which contains notices of almost every obscure medieval jurist; and German jurists still confound law proper with morality, as if he had never written.' Whether this complaint has come to Dr. Brunner's ears we cannot say; but he has given his answer to it in a not too respectful half-line which couples Austin's name with Naturrecht. It is not we Germans, he seems to reply, who are in danger of confounding positive law with morality, but some of you Englishmen, who seem to imagine that there can be a 'Jurisprudence' which is not a study of any particular system or systems of law. Such a 'Jurisprudence,' call it by what name you will, is and must be essentially Naturrecht, while in Austin's case it emphatically protests that it is not Recht at all. It is indeed the ghost of old Natural Law 'sitting crowned upon the ruins thereof.'

F. W. M.

Year Books of the reign of Edward the Third. Years XIV and XV. Edited and Translated by L. O. Pike. (Rolls Series.) 1889. La. 8vo. lxxvi and 424 pp.

For the manner in which Mr. Pike is accomplishing his important task we have still nothing but praise. Every volume that he publishes seems more complete and more useful than its predecessors. On the present occasion he gives us a very interesting Introduction dealing with some of the legal aspects of the great crisis of 1340–1. We should hardly have gone the length of saying that the striking events of those years had 'not attracted the special notice of historians,' for the Bishop of Oxford has given a good many pages to them; but Mr. Pike's intimate acquaintance with the records of this time enables him to describe fully and clearly the legal machinery that Edward III employed to effect his questionable or worse than questionable ends. He is led to speak of this matter by a very curious report of the

trial of Richard Willoughby, one of the justices whom the king had dismissed and arrested. He was tried before 'a special commission' (to use a now familiar term), and the commissioners, it seems, were appointed not 'to inquire of, hear and determine' in the ordinary way, but 'to arraign, hear and determine.' Without any indictment Willoughby was arraigned and accused of selling the laws as if they had been oxen or cows. In vain he protested that there was no indictment and no suit; it was answered to him that the king was informed of his misdoings by the clamour of the people. After a vain struggle with the presiding commissioner—the famous Sir Robert Parning—he made his submission; 'and afterwards the king caused him to be led from one county to another,' &c. The whole scene gives us a curious picture of the worst side of medieval justice. It was ill pleading against the king; the king's justices behaved and were expected to behave as his very obedient servants. This trial induces Mr. Pike to speak at some length and with good effect about the various forms of judicial commissions. One small point is worth notice: the king, wishing to humble the city of London, sent justices in eyre to sit at the Tower, and, as Mr. Pike says, 'The Eyre was an extremely disagreeable engine of punishment to any person or corporation holding any sort of franchise;' we may add that it was fast becoming an antiquated engine. One day's session of the justices was enough to bring the city to its knees. What Mr. Pike says on this point is well borne out by Adam of Murimuth, of whose chronicle Dr. Maunde Thompson has just given us a new edition. The eyre once so potent for good seems to have become little better than an instrument of oppression, and therefore Mr. Pike does well to insist on the great difference that there was between a commission for an 'iter' and the more modern and less comprehensive commissions. He carries his story down to Edward's repudiation, or revocation, or whatever we please to call it, of the statute of 1341. He lays stress on the protest of the ministers and judges which served as an apology for this high-handed act; whether he would agree with Dr. Stubbs, who is not wont to use hard words, that the king's conduct was 'a piece of atrocious duplicity,' he does not tell us, but of course the assertion of the justices and other members of the council that they were entitled or bound to disregard statutes made contrary to the laws and usages of the realm, is very memorable, even if it was merely a cloak for lawlessness. Altogether the Introduction is an excellent piece of work. The one cause for a critical murmur that we find in it is Mr. Pike's determined prosecution of his feud against the author of the Dialogus. On this occasion he singles out for attack the most famous passage in the book, that which describes the fusion of Normans and English. Surely there is a time for all things, and Mr. Pike, if he wishes to convert the world from the doctrines made popular, if not orthodox, by Stubbs and Freeman, must argue more elaborately than can be done in a foot-note.

In his text we will venture one small conjectural amendment—just by way of showing that we have looked for faults in vain. In the translation he gives us the following:—'Note—'Detinue of chattels. The plaintiff recovered damages and not the principal, because all things may be resolved into damages, as an equivalent' (p. 30). The words to be translated are, 'pur ce qe tout court en damage al contra.' Is not 'as an equivalent' a somewhat forced translation of 'al contra'? May not the last words be '*al'* [*i. e. alii*] *contra*,' and their meaning 'but others said that this was not so'?

Histoire des Institutions politiques de l'ancienne France. L'Alleu et le domaine rural pendant l'époque mérovingienne. Par Fustel de Coulanges. Paris: Hachette. 1889. 8vo. vii and 466 pp.

This is in every way a very remarkable book, and makes us more and more regret the death of its author. As Newton said of Cotes, 'If he had lived, we should have known something.' In the present volume M. Fustel de Coulanges traces the continuity of the rural organisation of the Roman estates through the Merovingian and Carolingian times until they become, in France at least, village communes which lasted, in fact, down to modern times. The Roman word for an estate was 'fundus,' 'praedium,' or 'ager.' 'Villa' meant first the mansion-house, then the whole estate. 'Cortis' was used in the fifth century in the same way. Each estate had a name, generally formed upon the name of the original Roman proprietor, and many of these names remain to the present day. For 'village,' as distinct from 'estate,' there is no Roman word, nor any French word till the thirteenth or fourteenth century; the village was only the collection of the dwellings of the serfs of the estate. The Roman system of cultivation was by slaves; and this gradually became cultivation by serfs. Serfdom slowly developed from slavery. The slave's 'peculium' would often include a bit of land, which is the origin of 'servile' tenures. In the third century there was a revision of the land-tax, and the serfs were taxed, which practically improved their tenure. There were also large numbers of freedmen, who in regard to the services due to their master were scarcely better than slaves, and were probably his tenants. Such a free tenant was called 'colonus,' and was a very small tenant indeed. He was succeeded by another 'colonus,' who was attached to the soil; but he was not a true serf, much less a slave, and possessed property. His duties were regulated by the practice of the estate. 'consuetudo praedii.' Part of his services consisted of labour on the lord's land, a relic of his former condition of slave.

Under the Franks the land remained distributed in 'villae,' which means 'estates,' not 'villages': the villagers were all 'coloni,' or serfs. The author entirely rejects the theory of a formal distribution of lands among the Franks; and, as for the word 'alleu,' he shows by many quotations that it means simply 'heritage,' as opposed to what we should call 'purchase.' It is mere conjecture that the word is Germanic; it is not found among the Visigoths, the Burgundians, the Lombards, or the Saxons. Even the word 'sors' simply means landed property, 'possessio.'

The influence of the Church tended to the enfranchisement of slaves, but did not do much for the inferior freedmen; and as enfranchisement might be granted subject to a great variety of conditions, the Church was satisfied, especially on its own estates, by an enfranchisement which practically left the cultivator where he was before. All these different classes of freedmen, serfs, and slaves, became confounded together under the general word 'villani.' All had a 'dominus,' and were designated as 'homines potestatis,' an expression which under the form of 'homme de pôté' lasted throughout the middle ages. The estate was 'unum quid' and required administration. The Roman 'villicus' and 'actor' we find down to the tenth century. Later the word is 'major' or 'maire,' which lasts through the middle ages. Large estates have also a 'judex.' By the nature of the case the only authority was that of the owner. He had been forbidden by imperial laws and councils to inflict death, but in other cases he was absolute and unappealable.

The author cannot see any trace among the Franks of community of property in land, or of annual partition. They had hereditary succession,

but not primogeniture; and if land descended to co-heirs, actual division very seldom took place. There is no trace of the village collectively holding land or of a village community before the tenth century. There were, however, some 'vici' which were not private property. As to the word 'mark,' its earliest use is in Ulfila's Gospels, where it means simply 'boundary;' then in the seventh and eighth centuries it came to mean the domain itself, or an aggregate of 'villae' in one ownership. But from the middle of the ninth century its meaning changes; it is applied to a forest bordering upon two or three estates, and used in common by the owners; and by the twelfth century it almost always means a part enjoyed in common by the tenantry.

From this account of the book it will easily be seen on how many interesting, even burning, questions it touches. Mr. Seebohm will find support for his theory of the servile origin of the agricultural population. However strongly M. de Coulanges' description of a Roman estate may correspond with that of an English manor, it must be observed that from beginning to end of the book the English manor is not once mentioned. When we add that this is not a work of mere speculation like 'La Cité Antique,' but that the author's arguments are supported by copious citations from the original authorities, after the best French historical method, we have said enough to show that the book is one which may perhaps be controverted, but cannot be ignored.

The Bishop of Lincoln's Case. Report of the proceedings in the Court of the Archbishop of Canterbury on the objections to the jurisdiction. With an Appendix containing the pleadings and a selection from the authorities cited. By E. S. Roscoe. London: W. Clowes & Sons, Lim. 1889. 8vo. ix and 90 pp.

This, so far as the Report of the proceedings is concerned, is a reprint from the Law Reports, and contains a verbatim report of the judgment. To this is added a selection from the texts cited, which is a great convenience to those who cannot readily lay their hands on the books themselves. Enough is given to show the points of the argument, especially as regards the absurd contentions put forward on the Bishop's behalf as to the jurisdiction of the comprovincials or of Convocation. These contentions are dealt with in a very masterly manner, obviously due to a lay, and not to a clerical mind, if it be allowable to suppose that His Grace retains both. Of course no lawyer, and probably no historian, ever had any real doubt on the matter; but still, to make such mincemeat of the wild theories propounded is a really great performance. There is one thing lacking in Mr. Roscoe's book; it was published a little too early. If he had delayed it a few months, he might have added the protests which are being signed among the clergy against the Archbishop's decision. Unreasoned and unreasoning, but portentously solemn, and absolutely ignoring the arguments and evidences, these funny documents would have made a splendid foil to the clear-cut common sense of the Primate's judgment.

A Treatise on the Law of Contracts and upon the defences to actions thereon. By Joseph Chitty, jun. The Twelfth Edition by J. M. Lely and Nevill Geary. London: Sweet & Maxwell. 1890. La. 8vo. cxxxii and 950 pp.

This is a good book for practical purposes, because by means of a good index and a first-rate table of cases the practitioner can very readily turn to

the point upon which he desires to throw light. It is, we suppose, too much to expect that a book which was in its origin unscientific will ever become scientific in the hands of any editor. It takes a stronger man to draw his pen through matter which has stood in type for half a century—to take an example, we may mention the old rubbish about Roman law in the early pages of the book—than it does to incorporate recent legislation and decisions in their appropriate places. To the practitioner, as we have said, this matters little. He goes straight to the index and reads only so much of the book as bears upon the point before him: the rest he ignores. It is only to those who cherish hopes of English law becoming a coherent and an intelligible study that these things matter. And with 'Chitty on Contracts' we have a feeling that it is too late to raise our voice in protest. Protest must needs be unavailing, unless an editor of unusual strength comes into the field. The new editors of the book in our hands have done a good deal in the way of reform and rearrangement. And the 'apparatus' of the book is first-rate, the dates of the cases being given in foot-notes for the first time. The body of the book is carefully brought up to the present time. Take, for instance, in the section on Contracts with Joint Stock Companies, the reference to the familiar rule of the Companies Act, 1867, s. 38, which states the obligation to specify contracts in a prospectus. First, the section is quoted: then the judicial construction of it as meaning action against the directors personally, not the remedy by rescission and removal from the register. Then comes the terse statement that 'the section is so widely worded that it would seem to include every kind of contract' (with a reference to the cases collected by Mr. Buckley), 'therefore it has become usual to insert a condition in prospectus' (*sic*) 'whereby the applicants waive the benefit of this section, but such condition of waiver is of doubtful validity' (with a reference to the remarks made by Mr. Palmer and Lord Justice Lindley on this latter point). This concise statement of the whole matter is just what the practitioner likes to find. It is accurate and trustworthy, and above all it is short. One other thing we must notice in this new edition, risking the charge of having read the preface alone. The editors have taken a new departure in calling attention to eight points of contract law which seem to them to require remedial legislation. It is not every lawyer who knows, for instance, that money left with a banker, if not drawn upon for six years, becomes, at the end of that time, the absolute property of the banker; or, to speak more exactly (for money lent becomes at once the borrower's property in any case) ceases to be recoverable from him as a debt. This has been the law since *Pott* v. *Clegg* (16 M. & W. 321) was decided in 1847, and it is perfectly logical. When you leave money on current account at your bankers, you simply lend money to your bankers, they undertaking to honour your cheques. The other points to which Mr. Lely and Mr. Geary draw the attention of the Legislature are more familiar. Of these that which may be labelled as the rule in *Peek* v. *Derry* is the most remarkable anomaly, and this has, we hope, the nearest prospect of being amended. The rest will be compelled to wait a long time before Parliament has leisure to attend to them.

A Treatise on the Law of Execution in the High Court and Inferior Courts, including the Powers, Duties, and Liabilities of the Sheriff, the High Bailiff, the Bishop, and other Executive Officers. By T. Kerr Anderson. London: Butterworths. 1889. 8vo. lxiv and 798 pp.

The importance of the branch of the law which Mr. Anderson 'attempts

to set forth in an exhaustive manner' is undoubted, and it is certainly curious that at the time his pages were commenced, that branch had never as a whole been made the subject of a separate treatise, though it is perhaps equally so that Mr. Edwards's book on the subject which appeared last year is not mentioned in the preface which dwells so much on the singular neglect of 'Execution' by legal writers. However, Mr. Anderson has produced a very useful reading of the cases and statutes which the Sheriff's Act, 1887, the County Courts Act, 1888, and numerous judgments of a remarkably recent date have invested with quite a modern appearance, though researches into ancient law have been by no means forgotten. As instances of skilful and accurate treatment, we may refer to the mode in which the distinction between 'Attachment' and 'Committal' are explained, and to the whole chapter on the writ of elegit, to which is prefixed a careful historical note. We have been disappointed in finding no light thrown on such little cruxes as the meaning of 'bedding' in s. 147 of the County Courts Act, 1888, and the extent to which *Thurgood* v. *Richardson*, 7 Bing. 428, may be regarded as an authority; indeed, Mr. Anderson has omitted to notice the conflicting case of *Re Bennett*, 2 Stra. 417, altogether. The index is good both in quality and quantity, with the single and unhappily too common exception that no page is given where the less important title is referred from to the more important. E.g. we read, 'Elisors. See Direction of Writ;' whereas the more efficient reading would have been, 'Elisors, direction of writ to, 23, 90. And see Direction of Writ.' More troublesome no doubt to the author, but trouble-saving to the reader, and therefore to be commended.

The Origin and Growth of the English Constitution. By Hannis Taylor. London: Sampson, Low & Co. 1889. xl and 616 pp.

Mr. Taylor's treatise is just one of those books which every reviewer wishes to commend, which deserves commendation, and yet which can hardly obtain very high praise from a competent critic. Mr. Taylor has read Stubbs, Freeman, Gneist, Bagehot, and the other authors whom it is proper that any writer on the English Constitution should study. He has put together the results of his reading in a readable form. Much of what he writes will, we take it, be really useful to persons who have had less time for study than has been possessed by Mr. Taylor. But as one glances at his book one cannot restrain a slight feeling of wonder that the treatise should ever have been written. The work is, no doubt, much shorter than Stubbs' History; it is much fuller than Freeman's Growth of the English Constitution; it contains an amount of historical information not to be found in Bagehot's inimitable essay. But are there students who when they can read Stubbs, or Freeman, or Bagehot, would prefer to read Mr. Taylor's treatise? We think, with all friendliness to Mr. Taylor, that this question must be answered in the negative. We can hardly conceive that the establishment of the English origin of the Federal Republic can be sufficient to make his book readable even in America. And such originality as his views of American federalism may possess serves to justify only the publication of the introduction to his book. This we admit might constitute an interesting essay of some 77 pages. For the existence of the other 500 and odd pages of his treatise it is difficult to find a justification. The plain truth is that the English Constitution is a subject which has been well worked, though not worked out. No one ought to labour at it unless he is able, like Hearn, by force of his own originality to bring forth new treasures from the still unexhausted mine of England's constitutional annals.

We have also received:—

Elements of Law considered with reference to Principles of General Jurisprudence. By Sir William Markby, K.C.I.E., D.C.L. Fourth edition. Oxford: Clarendon Press. 1889. 8vo. xii and 443 pp.—Sir William Markby's book is long past commendation. It is one of the very few English books on the philosophy of law which are both useful to beginners and profitable to teachers and thinkers. One may therefore be pardoned for minute and as it were accidental criticism of details. We cannot agree that the Court of Chancery 'ingeniously contrived to avoid a direct conflict with Courts of Law by giving decrees which were in form only *in personam*.' The sixteenth-century Chancellors did not avoid such conflict, nor is there anything to show that they greatly cared to avoid it. Equity jurisdiction operates *in personam* because it never had the means of operating any other way. In the chapter on Possession some changes have been made, and Ihering's recent work 'Der Besitzwille' is cited. But Sir William Markby does not seem to have been much impressed by the same writer's much earlier work 'Grund des Besitzschutzes;' and he still adheres in the main to Savigny's theory. This he is entitled to do, but the reader might have been more explicitly warned that the theory is no longer generally accepted among Savigny's own countrymen and followers. Ihering's work will, we hope, be more fully considered in a future number of this Review.

Code international de l'abordage maritime. Par F. C. Autran. Paris: Chevalier-Marescq et Cie. 1890. 208 pp.—The able editor of the *Revue internationale du droit maritime* has turned his particular facilities for collecting the laws and regulations of different States in reference to collisions at sea to account, and has produced an extremely useful little compendium on the subject. The book is divided into three parts. The first gives, so far as possible, the legislative texts of different countries relating to collisions. There are thirty-nine such countries. The second gives the regulations as to barring of action of the same countries; and the third gives the rules and decisions, so far as the author has been able to ascertain them, of these countries in the natural order of the materials relating to all branches of the subject, subdivided into twenty-two chapters.

There is no question upon which an international regulation is more desirable than that of collisions, and in no subject do greater difficulties in the way of international agreement seem to exist. 'Tantôt,' says M. Autran, 'c'est un capitaine autrichien qui abordé par un français et relâchant en Espagne, verra sa demande devant un tribunal français repoussée, parce qu'un avocat espagnol lui aura conseillé dans l'ignorance de la loi française, de protester seulement suivant la loi du pays de relâche, sans signifier sa protestation. Tantôt ce sera un capitaine anglais qui abordé au Chili par un navire hollandais plus tard saisi en France où les hasards de la navigation l'auront conduit, ne pourra pas agir utilement faute d'avoir introduit sa demande en justice devant un tribunal français dans le mois du sinistre. Pouvait-il deviner que la loi française serait jamais applicable en pareille occurrence?'

These are striking complications certainly, and are good evidence in favour of the promotion of an international regulation of the question.

If M. Autran should have to publish a second edition of his work, it would add to its utility, if he were to give a summary for each State of the authorities, enactments, cases, and authors, quoted by him.

La mer territoriale. Par Joseph Imbart Latour. Paris: Pedone-Lauriel. 1889. 380 pp.—This work was recently the subject of a reward

by the Institute of France, which had offered a prize for the best work on the law relating to territorial waters. The author seems to understand by territorial waters all waters in which an international interest may arise, though more particularly dependent on some one State. He does not define the scope of his work, but we gather this from the range of his subjects, among which are the Suez and Panama Canals. The book makes no pretension to throwing new light on any points in the controversy; but the author has done very useful work by examining and collecting in a systematic form materials for those who wish to take a complete view of the subject. The index, though it might have been more exhaustive, will help reference to the book's contents.

Trial by Combat. By GEORGE NEILSON. Glasgow: William Hodge & Co. 1890. Sm. 8vo. xvi and 348 pp.—We have not seen a more scholarly and interesting piece of work these many days. The author naturally gives most of his attention to Scottish antiquities, but he throws a good light on matters common to Scotland and England or even wholly English. He brings out with great clearness the distinction between the Anglo-Norman judicial duel as we find it in Bracton and the Year Books and the chivalrous duel imported from France in the fourteenth century. It was the duel of chivalry, not the duel of law, that gave rise to the modern 'code of honour' and the practice of duelling in the modern sense. Though the book is not large, it is full of learning. The only thing we have missed is a reference to the chapter of the *De Monarchia* where Dante proves that the conquests of the Roman Empire were a true and regular example of the *judicium Dei*.

Imperatoris Iustiniani Institutionum libri quattuor. With introductions, commentary, and excursus by J. B. MOYLE, D.C.L. Second edition. Oxford: Clarendon Press. 1890. 8vo. 2 vols. 683, 224 pp.—In this new edition 'the Excursus on Bonorum Possessio has been rewritten, and portions of others, as well as of the General Introduction, have undergone considerable revision.' In the translation that most untranslatable of terms *suus heres* is now rendered 'family heir.' A recent attempt, noticed here at the time, to revive Duarenus's ingenious view of the tripartite division *ius quod ad personas*, etc. does not find any favour with Dr. Moyle.

The Law relating to the Investment of Trust Money. By JOHN SAVILL VAIZEY. London: Sweet & Maxwell, Lim. 1890. 8vo. xvi and 265 pp.—The preface says: 'The bulk of this book consists of extracts, varied in accordance with recent legislation and decision, from the author's "Treatise on the Law of Settlements of Property" . . . . but the order of many parts is changed, chiefly in consequence of the changes in the law: parts are rewritten, some shortened and some omitted, while additions have also been made; in particular the print of the Trust Investment Act, 1889; the list of authorised investments, and Chap. xvi' (on the Responsibilities of Trustees). The book will no doubt be found useful by many who have not occasion for the larger work on Settlements; and it needs nothing more to recommend it than the already established reputation of that work.

The Annual Digest of all the Reported Decisions of the Superior Courts, including a selection from the Irish; . . . . during the year 1889. By JOHN MEWS, assisted by A. H. TODD. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. La. 8vo. xxxvii and 16 pp., 500 cols. *The Complete Annual Digest of every Reported Case in all the Courts for the year* 1889. Edited by ALFRED EMDEN. Compiled by H. THOMPSON, assisted by W. A. BRIGG. London: W. Clowes & Sons, Lim. 1890. La.

8vo. lxii and 508 pp.—Both these digests are of such well-known utility that very slight comment suffices. The tables of cases affirmed, followed or not followed, &c., are somewhat more neat and elaborate in 'Mews,' while 'Emden' makes a speciality of paying attention to select Scottish, Irish, and American decisions.

The Complete Practice of the County Courts, including that in Admiralty and Bankruptcy, embodying the County Courts Act, 1888, and other existing County Court Acts, Rules of 1889, Forms, and Costs. By G. PITT-LEWIS, Q.C., M.P. Fourth edition. London: Stevens & Sons, Lim. 1890. Two volumes. La. 8vo. Vol. I. cxxii, 807 and 383 pp. Vol. II. cix, 959 and 211 pp. —This work has been re-edited to correspond with the County Courts Act, 1888, and the Rules issued thereunder. The parts containing Forms have been separately paged, so that the owner can at his pleasure have them bound apart from the text.

A Handbook to the Death Duties. By SYDNEY BUXTON, M.P., and G. S. BARNES. London: John Murray. 1890. 8vo. viii and 109 pp.—It appears by Mr. Buxton's prefatory note that 'Buxton and Barnes' is mostly Barnes. After reviewing the present complication of the subject the authors suggest that probate duty should extend to all kinds of property, that legacy and succession duty should be consolidated on a uniform scale, and that the assessment of land as well as personalty should be on the true capital value.

A Compendium of Mercantile Law. By JOHN WILLIAM SMITH. Tenth edition. Edited by JOHN MACDONELL, assisted by GEORGE HUMPHREYS. London: Stevens & Sons, Lim.; Sweet & Maxwell, Lim. 1890. Two volumes. La. 8vo. lxxxiii and 1290 pp.—We can at present only call attention to Mr. Macdonell's new Introduction. It contains the best account yet given in English, so far as we know, of the history of the law-merchant.

The Study of Politics and Business at the University of Pennsylvania. [Philadelphia]. 8vo. 11 pp.—The 'Wharton School' of this University, established by the munificence of a private founder, appears to have much the same aims as the Ecole libre des Sciences Politiques in Paris, of which M. Leclerc gave our readers an account not long ago. It seems likely to be imitated elsewhere in the United States. We wish it might be so here. Why should not the Mason College at Birmingham, for example, do something of the kind?

A Manual of the Principles of Equity. By JOHN INDERMAUR. Second edition. London: Geo. Barber. 1890. 8vo. xix and 419 pp.—Mr. Indermaur appears, from his preface to this edition, to be ambitious of gradually converting his examination manuals into professional text-books. We wish him success, but we should have thought it easier to start afresh.

Oaths and Affirmations in Great Britain and Ireland, &c. By FRANCIS A. STRINGER. London: Stevens & Sons, Lim. 1890. 8vo. xi and 140 pp.—A useful little book 'full of strange oaths,' Buddhist and Parsee forms among others. Mr. Stringer does not mention that Jews taking an oath sometimes require the name 'Jehovah' to be used in the sanctioning clause.

The Indian Evidence Acts, I and XVIII of 1872, with an Introduction on the Principles of Judicial Evidence, &c. By WILLIAM GRIFFITH. London: W. H. Allen & Co. 1890. 8vo. xiv and 381 pp.—In this edition of important practical Acts the commentary is in larger print than the text; an inconvenient practice which is not without respectable pre-

cedent. Mr. Griffith has also edited the Criminal Procedure Code, and has an odd way of referring to it as if he had not only edited but written it. We call the attention of Anglo-Indian practitioners to the book as the latest edition of the Evidence Acts, without expressing any opinion of its merits.

The Law of Limitation and Prescription (in British India), including Easements, with an Appendix of Acts, and a full Commentary on Act XV of 1877. By UPENDRA NATH MITRA. Second edition, revised and brought down to date. Calcutta: Central Press Co., Lim. 1889. 8vo. xlviii and 760 pp.

Das bürgerliche Recht und die besitzlosen Volksklassen. Eine Kritik des Entwurfs eines bürgerlichen Gesetzbuches für das Deutsche Reiche. Von DR. ANTON MENGER. Tübingen, 1890. La. 8vo. v and 156 pp.

The New Factors Act Annotated. By A. B. PEARSON-GEE. London: Wildy & Sons. 1890. 8vo. 100 pp.

NOTES.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

Legal Education in the Inns of Court.

It is no secret that the scheme of legal education existing in the Inns of Court has been felt by a considerable proportion of those Benchers who take any serious interest in the matter to be far from satisfactory. We believe that the whole subject is under active consideration with a view to reform or recasting of the present Consolidated Regulations. Those Regulations, and the prospectuses of lectures issued thrice a year, are public and accessible documents, but they are in fact unknown to the general public and seldom perused by the majority of the profession. It may therefore be useful to state shortly what are at present the means of 'systematic instruction' (Consol. Reg. § 26) provided by the four Inns.

Under § 29 the Council of Legal Education (a joint Committee of Benchers of the four Inns) appoints professors to lecture on:—

'i. Jurisprudence, to include the subjects numbered i, ii, and iii in clause 42 of these regulations';

(*i.e.* i. Jurisprudence, including International Law, Public and Private;
ii. The Roman Civil Law [*sic*];
iii. Constitutional Law and Legal History);

'ii. Common Law, to include the subjects numbered iv. and vii. in clause 42' (*i.e.* Common Law and Criminal Law) 'and in the Law of Evidence;

iii. Equity;

iv. The Law of Real and Personal Property.'

The number of professors is not expressly specified in the Regulations; but in fact one whole professor is assigned to Common Law, Equity, and the Law of Property respectively, and two half-professors (if the term may be allowed) to the subjects grouped as 'Jurisprudence.' These two last-mentioned teachers divide the work and the salary, lecturing in alternate terms. The actual teaching power, therefore, consists of four professors. In each of the four subjects or groups of subjects thirty-six lectures are given in the legal year. There is no provision for any graduated course of instruction to be followed by a student for any definite time, nor for any separation of elementary from advanced teaching.

There are certain other provisions which it is right to mention, lest they should seem to have been overlooked.

Clause 30 empowers the professors to hold private classes if they please, and receive fees from the students attending such classes. This power has never been exercised. Any one acquainted with the working of University and College lectures would have seen that it was not likely to be.

Clause 32 requires that 'to secure systematic instruction' the scheme of the lectures to be given by each professor be submitted to, and approved

by, the Committee of Education and Examination (a sub-committee of the Council). This is done, but it has become a mere form, if indeed it was ever otherwise. Every professor lectures, in practice, on such parts of his own subject as he happens to be most familiar with or most interested in, and so far as we know the Committee makes no attempt to guide the choice of subjects or maintain any relation whatever between the four simultaneous courses.

Clause 33 empowers the Council to 'make arrangements for the delivery of occasional lectures or courses of lectures on any legal subject.' This also is a dead letter, so far as is known to the present writer. Certain courses of technical lectures on forensic medicine and other applied sciences have recently been given in the Temple, but not on the motion or under any supervision or sanction of the Council.

The normal term of a professor's office is three years (§ 31), with a maximum annual salary of 1000 guineas (§ 35: the Council have fixed it at that sum, halved, as before mentioned, in the case of the divided 'Jurisprudence' chair).

The Council has no power to alter the classification or distribution of subjects, or the number of teachers.

One merit, that of novelty, cannot be denied to a classification of legal topics in which Jurisprudence means Jurisprudence and several other things, including Roman Law, and Common Law means Common Law and Criminal Law, but does not include the Law of Evidence; whereby it appears that Criminal Law is perhaps, but not certainly, part of the Common Law, and the Law of Evidence is certainly not so. The barbarous pleonasm of 'Roman Civil' Law was assuredly never approved by Prof. Bryce or by his successor Prof. E. C. Clark, for they are both scholars. The implied proposition that the Law of Real and Personal Property is a thing neither of Common Law nor of Equity may be left for the meditation of the curious.

Apart from terminology, it may be asked why International Law and Constitutional Law, each of them a sufficiently large and complex topic, are lumped in with Roman Law and something called Jurisprudence which includes International Law but is larger, and why these four subjects must be or in fact are so related to one another that there cannot at any one time be a demand for instruction in more than one of them. It may further be asked why it is made impossible to obtain instruction in Criminal Law or the Law of Evidence (notwithstanding the strong marking-off of the latter, in the scheme itself, from the general body of Common Law), save when the Professor of Common Law thinks proper to select one of those subjects in preference to any portion of the spacious field of contracts and civil wrongs. Further, why, in a practical law school established in London, the modern development of commercial and maritime law is not in any way recognized. Further, what is the exact meaning of the Law of Personal Property, and how much attention it is expected to get if the Law of Real Property (notoriously the most difficult branch of our law to beginners) is treated on an adequate scale and with adequate care.

A learned Frenchman, the Comte de Franqueville, has published an elaborate account of the English Bar, read last year as a series of papers before the Académie des Sciences Morales et Politiques. After explaining the career of an English student in the Inns of Court, he says: 'Alors même qu'il a régulièrement suivi les cours des professeurs, son éducation est absolument insuffisante.' Can we maintain that the censure is unjust?

We do not say anything at present about the Bar Examination; but it must not be assumed that we keep silence because there is nothing to be said.

The Late Dr. Lorimer.

Dr. James Lorimer, Professor of Public Law in the University of Edinburgh, who died in the middle of last February at Edinburgh, was one of the few British jurists who clung to, and had indeed devoted himself to reviving, the older view of law which regards it as founded upon metaphysical science as opposed to what may be called the positive or utilitarian view on the one hand and the historical view on the other. He was also one of the unhappily almost equally small band who interest themselves in international law and maintain friendly personal relations with the jurists of Continental Europe. In both these respects he rendered valuable services; and his books have been much appreciated in Germany, France, Spain, and Italy. English students will be apt to think them somewhat too abstract; but they are often suggestive, and have the merits of a fresh and pleasing style and a genuine earnestness of feeling. Dr. Lorimer was a zealous University reformer, and did much for the study of law in Scotland, as well as for the intellectual advancement of his own students, among whom he was deservedly popular. No one could know him without respecting the elevation and integrity of his character, and being won by the genial courtesy of his manners.

Referring to the note in L. Q. R. vi. 122, in respect of what was said in *Re Missouri Steamship Co.* (42 Ch. Div. 330) as to the citation of American cases, the Times newspaper, 2nd of May, 1889, at page 13, reports an observation in the course of the argument on that appeal, which I have not been able to find anywhere else. After the protest reported, 42 Ch. D. 330 and the top of page 331, the newspaper report continues—

'Sir Walter Phillimore said that he should cite American cases only upon questions of American law or of international law.

'The Lord Chancellor said that that would be legitimate.'

This is an important qualification, though, as Lord Selborne has said, even the uniform practice of the Courts of the United States cannot make the law for England (*Ewing* v. *Orr Ewing*, 10 App. Cas. 453, 513).

Horace Nelson.

Notes on the Conveyancing Act, 1881, s. 4.—This section provides that 'Where at the death of a person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee-simple or other freehold interest, descendible to his heirs general, in any land, his personal representative shall by virtue of this Act have power to convey the land for all the estate and interest vested in him at his death in any manner proper for giving effect to the contract.'

It will be observed that the section only applies to a contract for the sale of 'the fee-simple or other freehold interest descendible to his heirs general.' The question whether an estate *per autre vie* limited to the heirs falls within this description is perhaps not entirely free from doubt. But on investigation it will, I think, appear that the doubt arises from the dicta of modern judges delivered in cases in which the earlier authorities are not cited. Dicta will be found that in a case of this nature 'the heir does not take by descent;' *Chaplin* v. *Chaplin*, 3 P. W. at 368. 'It is impossible that it can be right to say that it descended upon the heir;' *Ripley* v. *Waterworth*, 7 Ves. at 437. 'Such estates have been sometimes called, though improperly, descendible freeholds;' *Doe* v. *Luxton*, 6 T. R. at 291. See to the same effect, *Pickers-*

gill v. *Grey*, 30 Beav. 352. The key-note of these dicta will be found in the remark of Lord Eldon in *Ripley* v. *Waterworth*, where he says, 'It is singular that it falls to me to decide this question for the first time.' It appears as if not only the judge but all the counsel were in blissful ignorance that the question had already been discussed and the answer laid down in books of authority. To consider these authorities:—

Bracton says, lib. 2. cap. ix: *Si autem fiat donatio sic, ad vitam donatoris, donatorio et haeredibus suis, si donatorius praemoriatur, haeredes ei succedent, tenendum ad vitam donatoris, et per assisam mortis antecessoris recuperabunt, qui obiit ut de feodo.*

Coke says, in *Edward Seymour's Case*, 10 Rep. at 97 b, in a passage which ought to be studied with attention by every one who wishes to understand the nature of estates: 'Every estate descendible to the heir, is either an estate of inheritance or an estate of freehold; an estate of inheritance is either fee-simple or fee-tail; an estate of fee-simple is either an estate of inheritance absolute and indeterminable, as where lands are given to a man and his heirs he has such a pure and simple estate which can never determine, or a fee-simple determinable.' He then explains the different manners in which a fee-simple determinable, which includes a base fee, can arise: 'In all these cases he who hath such an estate of inheritance may plead that he is seised of the land in his demesne as of fee' . . . . . 'An estate of freehold descendible in like manner is either expressed or implied; expressed as if a man demises land to one and his heirs during the life of J. S., or tenant for life grants his estate to one and his heirs; in these cases the lessee or grantee has an estate of freehold descendible, but no estate of inheritance, for he shall be punished for waste, and he in reversion or remainder shall enter for forfeiture, and his heir shall not have his age, for he in a manner is but a special occupant, nor shall he in respect thereof be charged as heir in an action of debt. Implicite, as where in the case at bar tenant in tail bargains and sells the land to William Higham and his heirs, he has an estate descendible and determinable upon the death of the tenant in tail.'

The words 'in a manner is but a special occupant' deserve attention. Coke says, at Co. Lit. 41 b and 239 a, that the word 'heirs' is used to prevent an occupant. The whole question as to what is meant by 'occupant' is discussed at great length in *Holden* v. *Smallbrooke*, Vaugh. 187, where the judge deduces from the conclusions to which he had arrived (see at p. 201), 'If a man demise land to another and his heirs *habendum pur autre vie*, or grant a rent to a man and his heirs *pur autre vie*, though the heir shall have this land or rent after the grantee's death, yet he hath it not as special occupant (as the common expression is); for if so, such heir were an occupant, which he is not, for a special occupant must be an occupant, but he takes it as heir, not of a fee but of a descendible freehold; and not by way of limitation, as a purchase, to the heir, but by descent, though some opinions are that the heir takes it by special limitation. . . . . But I see not how, when land or rent is granted to a man and his heirs, *pur autre vie*, the heir should take by special limitation after the grantee's death, when the whole estate was so in the first grantee that he might assign it to whom he pleased, and so he who was intended to take by special limitation after the grantee's death should take nothing at all.'

The case in 27 Ass. pl. 31, cited and paraphrased in *Walsingham's Case*, Plow. at 556, shows that where tenant by the curtesy grants his estate to one and his heirs, the son of the grantee can bring an assize as heir.

The conclusions to which I am inclined to come are the following:—

(1) That the modern cases which deny the descendible quality to an estate

per autre vie limited to the heirs are of but little authority, as they appear to have decided in ignorance of the older authorities.

(2) That an estate *pur autre vie* limited to the heirs is, strictly speaking, 'a freehold interest descendible to the heirs.'

(3) That as the words 'fee-simple' in the section of the Conveyancing Act under discussion include every estate that passes to the heirs general except estates *pur autre vie* (see *Edward Seymour's Case, supra*), and as the only other estate that can by any possibility pass to the heirs as such is an estate *pur autre vie* limited to the heirs, an estate of this nature is the only estate that could be meant by the words 'other freehold estate descendible to his heirs general,' even if the word 'descendible' was not strictly applicable to the manner in which the heirs take.

Real property lawyers may perhaps draw this moral from the cases that I have cited, 'Never think that you understand any question in the law of real property until you have studied the old authorities.'

H. W. E.

The Law Reports for March were badly in arrear, being published nearly a week after date: and critical notice of such decisions as *e.g.* that of Kay J. on the rule against perpetuity, *Frost* v. *Frost*, 43 Ch. D. 246, is impossible at present. In our opinion the Council of Law Reporting would have done much better to keep the guinea taken off from the subscription a few years ago, and use it in improving the quality of their work and the punctuality of its production. The seniors of a learned profession ought not to give in to the practice of making things cheap and — but we leave the reader to supply any epithet consistent with professional decorum.

If any young reporter desires a model of what a head-note should not be, let him consult *Re New Eberhardt Co., Ex parte Menzies*, as reported in 43 Ch. Div. 118. The point decided is quite short, and is to this effect. An offer in writing accepted by parol does not by such acceptance become such a 'contract duly made in writing' as is required by s. 25 of the Companies Act, 1867. The authorities as to what is a sufficient 'note or memorandum' within the Statute of Frauds do not apply to such contracts. The head-note in the Law Reports, however, consists of a diffuse statement of the facts of the case, from which the reader is left to discover as best he can what the legal point or points may have been. We are bound to say, however, that we have not seen any other report which does much better. Five years ago Lord Justice Lindley wrote in this REVIEW (vol. i. pp. 143, 144): 'The legal pith of a case and nothing more should appear in its head-note . . . The great point to bear in mind is that what the profession wants is law, and such facts only as are necessary to enable the reader of the report to appreciate the law found in the case.' But that excellent saying, 'If I had had more time, I should have made it shorter,' explains many of the shortcomings of law reports as well as sermons.

'There is no darker page in the annals of English jurisprudence than the law of bills of sale.' Such is the deliberate opinion of the judge most competent of all to speak on the subject, Mr. Justice Cave (*Ex parte Collins, Re Yarrow*, 59 L. J., Q. B. 20), and he goes on to speak of the Acts as 'illogical, uncertain, and full of doubt and difficulty.' So far as it is possible to predicate anything of that bewildering legislation, it had two principal objects:

(i) by a system of registration to give notice to the world that the apparent owner of mortgaged chattels was not the true owner and so prevent him getting a delusive credit, and (ii) to protect ignorant and necessitous persons from being victimised by the money-lender. The latter of these the Act of 1882 sought to accomplish by modelling the contract through the medium of a statutory form. On this Procrustean bed of the statutory form grantor and grantee have alternately been racked with judicial impartiality till bill of sale dealing has become a desperate species of gambling and the money-lender a Shylock. Everybody knows this now. Most people know too that the statutory form has been successfully evaded by the easy device of a sale and rehiring which has received the sanction of the highest Court (*Manchester, S. and L. Rly. Co.* v. *North Central Wagon Co.*, 13 App. Cas. 554; *Jones* v. *Tower Furnishing Co.*, 61 L. T. R. 84). But it was reserved for *Tuck* v. *Southern Counties Deposit Bank* (42 Ch. Div. 471) fully to discover to what a weak and impotent conclusion the Acts have conducted us. *A* assigns furniture absolutely by deed of gift to his wife and the furniture is removed to her separate dwelling. This assignment is not registered. *A* afterwards gives a bill of sale over the same furniture to *B*. This assignment is registered. Notwithstanding s. 10 of the Act of 1878 giving priority according to the date of registration, the wife is entitled to the furniture because *A* was not 'the true owner' of it under s. 5 of the Act of 1882 at the time he gave the bill of sale to *B*, and *B*'s bill is therefore void. If this is so, registration is a mere farce. If the Court had decided that the first assignment having been completed by a transfer of possession was not a transaction requiring registration as not within the mischief of the Act, this would have been in accordance with *Re Hall* (14 Q. B. D. 117) and *Re Cunningham* (54 L. J. Ch. 448); but it did not. It held that the first assignment was one that ought to have been registered. This *reductio ad absurdum* of the Acts, for it is nothing less, rests on the construction put on s. 5 of the Act of 1882. Lord Justice Lopes' view that it applies only to after-acquired property is, to say the least, highly probable; and is confirmed by the marginal note as pointed out in *Re Tamplin, Ex parte Barnett* (38 W. R. 351); but in that 'sea of doubt' the Bills of Sale Acts we drive at random, as Young says, 'our helm of reason lost.' The law under the Acts has in fact got into such a state of entanglement that 'lucidity' is hopeless, and an amending Act will only make confusion worse confounded. 'Oh! reform it altogether,' we may exclaim with Hamlet. Cave J. long ago said, 'It is a mistake to force business transactions into a certain form instead of stating and applying principles' (*Re Cleaver*, 34 W. R. 760), and this opinion has been amply justified by the disastrous record of the statutory form. If bills of sale are still to be registered, and convenience seems in favour of retaining some system of registration, the registration must be simple and effectual. At present registration is no protection against the bankruptcy of the grantor, nor against a prior unregistered grantee. It is worse than useless, a mere snare. Unfortunately these Acts are only samples of the hasty, ill-considered, and ill-drawn legislation which is the least creditable feature of our recent legal history. The reflection they suggest is, to use Lord Campbell's words, 'the vast superiority of judge-made law over the crude enactments of the legislature.'

E. M.

A suit for restitution of conjugal rights is an anomaly if not an absurdity, the matrimonial partnership being, still less than the commercial, susceptible of being specifically enforced. The Matrimonial Causes Act, 1884, has

recognised this, and it was probably a sense of the irony of the situation which, consciously or unconsciously, dictated the decision of the Court of Appeal in *Field* v. *F.* (14 P. D. 26), that a demand for restitution must be couched in conciliatory language, and must not, as Cotton L.J. expressed it, be like holding a pistol to the husband's head (*Smith* v. *S.*, 59 L. J. P. D. & A. 11). As a rule of comity this is excellent, but as a construction of the Rules it is not impertinent to observe that *Field* v. *F.* has been twice distinguished within a few months. For instance, if the wife has made a civil request to her husband to take her back and he has rudely refused, she may cast away 'respective lenity' and claim the rigour of the game (*Mason* v. *M.*, 61 L. T. R. 304). In the other case, *Smith* v. *S.* (59 L. J. P. D. & A. 9), the wife had signed her solicitor's letter demanding restitution, and the Court of Appeal seem to have thought that the pistol being presented by the wife was more conciliatory than when presented as in *Field* v. *F.* by the solicitor, though it may be questioned whether the recalcitrant husband would think so. Conciliation, in truth, is not wanted. The Act of 1884, abolishing attachment for disobedience to a restitution decree, has put an end to the suit as a means of enforcing a return to cohabitation, if it was ever used *bona fide* for that purpose. It exists now only for the purpose of working out the rights (other than those of cohabitation) which arise out of the marriage contract,—alimony, for instance, or the custody of children. 'I have never known an instance,' said Sir James Hannen (*Marshall* v. *M.*, 5 P. D. 23), 'in which it has appeared that the suit' (for restitution) 'was instituted for any other purpose than to enforce a money demand.'

The tenacity of old ideas shows itself very strongly in the decisions on the Married Women's Property Act, 1882, which have minimised, if not neutralised, much of that well-meant legislation. The Court of Appeal began by deciding (*Palliser* v. *Gurney*, 19 Q. B. Div. 509) that a wife's capacity to contract depends on her being possessed of separate property. What rational connection there is between the capacity to contract and the possession of separate property it is difficult to see, but the Legislature must now be taken to have said so. This being settled, the question of course arose what separate property would endow her with capacity. Would a wedding-ring or the possession of a bonnet? If so, there was an end of a married woman's incapacity; so lest she should become one of us, knowing good and evil, *Leak* v. *Driffield* (29 Q. B. D. 98) has decided that the qualifying property must be property with respect to which she might reasonably be deemed to have contracted. We are thus brought round again to the old law as it stood at the date of *Johnson* v. *Gallagher* (3 D. F. & J. 494), the evils of which s. 1 (3) was expressly designed to abolish, and plunged in all the perplexities of presumed and inferred intention. This is the result of the Legislature halting between two opinions, a personal and a property obligation. While a married woman was classed with infants and lunatics, it was quite right that she should enjoy the immunity of incompetency; but the fiction of incompetency having broken down, it is time to accept the only logical conclusion and treat her as a *feme sole* for all purposes, except perhaps the exclusion of her husband on her intestacy.

It indicates an advance that North J. has in *Re Dixon, Byram* v. *Jull* (42 Ch. D. 306), treated a gift to a husband and wife and a third person as a gift to a husband and wife in severalty, dissenting from *Re Jupp* (39 Ch. D. 148), but the decision went on the construction of the will (which was after the passing of the Act of 1882, but before the Act came into operation), not on the status of the wife as a *feme sole*.

Setting aside settlements is at all times one of the most difficult heads of equity jurisdiction, particularly if the settlement is a re-settlement of family estates. The son in such re-settlements is but 'puppet to a father's will,' and it often happens, as an eminent conveyancer has said, that he is dissatisfied with having been induced to deprive himself in very early life of his expectant absolute ownership. The difficulty is that such a re-settlement is not to be dealt with like an ordinary bargain to see whether the son has got a precise equivalent for what he gave up, but rather as a family compromise to preserve the peace and honour of the family or to save the family estates from disintegration. In this view parental influence has always been recognised by the Court as legitimate, because presumably prompted by experience and affection, but the jealousy of the Court is at once aroused if it appears that under the re-settlement the father has obtained an advantage at the expense of the son, and *a fortiori* if the son has had no independent advice. This was the case in *Hoblyn* v. *H.* (38 W. R. 11), where the father had reserved to himself the power of charging the estate with £2000, The power had however been inserted by an error of judgment rather than from any desire to get an unfair advantage, and the father consenting to release it, Kekewich J., in lieu of setting aside the re-settlement, took the more satisfactory course of rectifying it by striking out the objectionable provisions.

Considering how common a covenant to settle after-acquired property is, and the learning which has gathered round the construction of such covenants, it is singular that it should never have been decided whether such a covenant binds property acquired by the husband in his wife's right after her death. *Fisher* v. *Shirley* (43 Ch. D. 290) decides that it does. Where the wife is the survivor, and nearly all the cases have been of this kind, the Court reads the covenant as if the words 'during the coverture' were inserted because the object of the covenant is to exclude the marital right (*Re Edwards*, 9 Ch. 97), and on the husband's death that object is accomplished. It is otherwise when the husband survives.

The law relating to the limitation of actions is in a sad state of confusion, thanks to the crowd of cases and statutes 'crossing and cuffing one another,' as King James expressed it. Take mortgages. If the remedy against the land is barred under the Real Property Limitation Act, 1874, the personal remedy is barred also (*Sutton* v. *S.*, 22 Ch. Div. 511). The same limitation applies to an action against the mortgagor upon a bond given by him to secure the mortgage debt (*Fernside* v. *Flint*, 22 Ch. D. 579). Enter now on the scene a surety for the debt. Is the bar good against him? In *Re Powers, Lindsell* v. *Phillips* (30 Ch. Div. 291), an action on a bond by such surety guaranteeing the mortgage debt, the Court of Appeal thought not, on the ground that the debts were different. In *Re Frisby, Allison* v. *Frisby* (43 Ch. Div. 106), the surety joined in the personal covenant, and the Court seems to have been at variance. If the action is not barred, the protection of the mortgagor under *Sutton* v. *S.* will obviously be illusory, for he will be got at through the surety. The surety, it is to be noted too, loses the benefit of the Real Property Limitation Act, 1874, if his principal pays any interest. Section 14 of the Mercantile Law Amendment Act, 1856, saving his rights in such a case, applies only to 3 & 4 Will. IV. c. 27.

Beck v. *Pierce* (38 W. R. 29) is of some interest to unfortunate husbands liable, as the Married Women's Property Act, 1882, still leaves them, to a wife's ante-nuptial debts, to the extent of any property acquired from her. In such a case the statute runs in the husband's favour from the date when

the cause of action accrued against the wife, not from the date of the marriage. This is fair, for the liability is founded on the wife's contract, and the husband is only brought in as the recipient of what would, but for the marriage, have been the wife's separate property.

The law, as Charles Lamb said of a Scotchman, stops a metaphor like a suspected person. 'Equitable execution,' which the Court of Appeal challenged in *Re Shephard, Atkins* v. *Shephard* (43 Ch. Div. 131), has hitherto passed unmolested as a good, or at least convenient phrase, like legal fraud, to express a well-understood idea. It is now explained to be 'erroneous.' Inexact it may be, but the inexactness after all is technical, not substantial. It answers the end of all execution, and differs chiefly in being a process for obtaining payment out of equitable instead of legal assets. The distinction however was not quite unimportant in *Re Shephard*, because the question there was whether the Court has a discretion to refuse the appointment of a receiver by way of equitable execution after the death of the judgment debtor in the absence of the person entitled to the property. In the case of legal execution leave must be obtained under O. 42, but it is not clear that it might not be obtained *ex parte*. In granting equitable execution, like any other equitable relief, the Court has, as it always has, a discretion to impose what terms it thinks proper to secure justice. Subject to this the relief is *ex debito justitiae*.

A person against whom sequestration has issued for contempt need not hope, after *Pratt* v. *Inman* (43 Ch. D. 175), to escape by dying, that is if the duty is one which his estate is available to discharge, e. g. payment into Court. Sequestration for not answering interrogatories, for instance, is different: *Moritur cum persona*.

That there exists in our law some principle that a felony must first be prosecuted before it can be made the ground of a civil action is pretty plain (*Crosby* v. *Leng*, 12 East: 1 Hale, P. C. 546). It has been recognised from very early times, but down to the latest case, *S.* v. *S.* (Q. B., Ireland, 16 Cox, C. C. 566), there has been so much difference among judges as to how the rule is to be stated and applied as even to have led to some scepticism as to its existence. There are obvious reasons of public policy for such a rule, the chief being the temptation to 'smother' a felony through the medium of a civil action, a temptation doubly strong when felony involved forfeiture. Taking what seems the most reasonable view, that the right of action is merely suspended till the felony has been prosecuted by somebody or prosecution has become impossible by the felon having died or got beyond the jurisdiction (*Ex parte Ball*, 10 Ch. Div. 667), the question still remains who is to move in the matter. The defendant 'allegans turpitudinem suam non est audiendus.' The Crown can hardly be expected to examine the allegations in every action of tort. If the rule is not to be a dead letter the Court must act of its own motion. According to *S.* v. *S.*, it has jurisdiction to do so, and stay the action where the interests of justice require it—which the majority of the Court thought, in the case at bar, they did not. *Wells* v. *Abrahams* (L. R. 7 Q. B. 554), which threw doubt on the jurisdiction, really turned on a technical point—the judge at nisi prius being a mere commissioner to try issues. *Wellock* v. *Constantine* (2 H. & C. 146) is a clear authority for the jurisdiction, the mistake there being only in non-suiting instead of staying, as the Exchequer Chamber intimated by offering a stet processus.

Autrefois convict is, it seems (*Reg.* v. *Mills*, 38 W. R. 334), a good bar to all further criminal proceedings, though the first conviction has not been followed by fine or imprisonment, but only by security being required for good behaviour. The time-honoured rule would be seriously imperilled if this were not so.

That a man who puts his hand into your pocket *animo furandi* is not guilty of an attempt to steal if the pocket is empty savours more of casuistry than common sense. Yet *Reg.* v. *Collins* (9 Cox, C. C. 497) so decided. The Court of Crown Cases Reserved is not 'satisfied' with this decision (*Queen* v. *Brown*, 24 Q. B. Div. 357). Probably no one is but Mr. Bill Sykes. His grievance is not great if *Reg.* v. *Collins* be not law, for anyhow he might be indicted for an assault with intent to commit larceny. It ought to be made quite clear whether the Court of Crown Cases Reserved holds itself free to dissent from its own previous decisions. Twenty years ago it apparently did not: *R.* v. *Glyde*, L. R. 1 C. C. R. 139.

It was at one time thought that a company could not mortgage its uncalled capital, the notion being that to do so would interfere with the directors' discretion in making calls (*Stanley's Case*, 4 D. J. & S. 407). A distinction was soon drawn where the call had been already made or determined on (*Re Sankey Brook Coal Co.*, 9 Eq. 721); and in *Re Phœnix Bessemer Steel Co.* (44 L. J. Ch. 683) Jessel M.R. pointed out that the objection as to directors' discretion was one evidently not appreciated by the Legislature when it expressly sanctioned such borrowing under the Companies' Clauses Act, 1845. After the careful and exhaustive judgment of Stirling J. in *Re Pyle Works* (38 W. R. 282) we shall probably hear no more of it. But of course it is still necessary that a company should have power, expressed or implied, to make such a mortgage. A more plausible contention in *Re Pyle Works* was that such a mortgage is not good against unsecured creditors as to calls made in winding-up, the uncalled capital being the only fund available to satisfy their claims; but this hardship or hazard to creditors of a company is only one of the results of the limited liability principle. The creditors know what they have to look to if they choose to consult the register of shareholders and mortgages.

A winding-up petition by a person who had attached a debt of a company, led, in *Re Combined Weighing Machine Co.* (43 Ch. Div. 99), to an interesting discussion on the effect of a garnishee order. Such an order does not operate as a transfer of the debt so as to make the attaching creditor a creditor of the company. Neither does a right to be indemnified by a company make the person a creditor for the purpose of a winding-up petition (*Re Law Courts Chambers Co.*, 61 L. T. R. 669).

An unregistered literary society cannot be wound up under s. 199, which applies only to trading associations (*Re Bristol Athenæum*, 43 Ch. D. 236).

The new winding-up Bill essays, by the way, to put a new patch on the old garment: it is to be hoped the rent will not be made worse.

Englishmen hardly realise how large an amount of the work done by our Courts is not of a strictly legal character. Whoever will glance at, say, the first number of the Law Reports for this year, will see that a large proportion of the cases decided deal in reality with questions of administration. Thus the *Hornsey Local Board* v. *The Monarch Society*, 24 Q. B. Div. 1; *Smith* v. *Wood*, 24 Q. B. Div. 23; *In re London, Tilbury, &c., Ry. Co. Case*,

ibid. p. 40, raise just the kind of point which concerns administration quite as much as law. English tradition favours the decision by a legal tribunal of all cases which directly or indirectly may involve legal questions. But this, like other traditions, may become a prejudice, and it is not certain that the labours of the Courts might not be lightened and the working of English administration be improved by referring what foreigners would call 'administrative questions' to administrative bodies. *Smith* v. *Wood*, 24 Q. B. D. 23, is an odd example of the way in which adherence to precedent and to the letter of a statute may render an enactment practically inoperative. The Court of Appeal were, we assume, right in their law, but a body of officials, who were not judges, would have enforced the statutable penalty against Wood.

Nouvion v. *Freeman*, 15 App. Cas. 1, affirms the judgment of the Court of Appeal. The decision in the House of Lords, as in the Court below, turns on a question of Spanish law, namely the nature of a *remate* judgment. In one point of view only has the case any general importance. From the opinions of their lordships may be extracted a more precise definition than has hitherto been given of a final judgment. Such a judgment is a decision of which it can be shewn that, to use the words of Lord Herschell, 'in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties.'

Pain v. *Boughtwood*, 24 Q. B. D. 353, following in effect *Betts* v. *Armstead*, 20 Q. B. D. 771, determines that the seller of an article of food, such as milk, who sells it after he has abstracted any part thereof so as to affect its quality injuriously without giving notice to the purchaser, is liable to a penalty of £20 under the Sale of Food Act, 1875, s. 9, even though at the time he sold the milk he did not know of its having been altered. The case determines in a particular instance a question of great general consequence, namely how far the *mens rea* is necessary for the commission of statutable offences. The tendency of recent legislation as interpreted by the Courts tends to increase the liability of traders and to establish the rule that a person who sells goods which have been adulterated does so at his peril.

The Merchandise Marks Act, like the Sale of Food and Drugs Act and many others, illustrates how the Legislature is constantly turning private torts into public offences to meet the growing exigencies of society. This tendency is very observable in watching the development of our law. Originally indeed all crimes seem to have been treated merely as torts. Socialistic legislation such as that of the Merchandise Marks Act has become necessary, for two reasons: (i) the inadequacy of a civil action to counteract the temptations of self-interest, even if the plaintiff could prove the necessary fraud; (ii) the far-reaching consequences of wrongs which spring from such malpractices as adulteration or applying false trade descriptions, whether to gunpowder or ginger-beer. There is not only the buyer, but the true owner of the pirated mark and the sub-buyer or buyers. What may not have deceived the buyer becomes an instrument of fraud in his hands. Then too, in case of food and drugs, there is the health of the

community, matter of state concern. *Starey* v. *Chilworth Gunpowder Co.* (24 Q. B. D. 90) and *Wood* v. *Burgess* (24 Q. B. D. 162) are instructive commentaries on the Act, as showing that 'intent to defraud,' like guilty knowledge in the case of the Sale of Food and Drugs Act, is not necessary to constitute the offence, and for a very good reason, that the necessity of proving a psychological fact would render the Act a dead letter. In this there is no arbitrary creating of a new offence. The 'mens rea' is there in the shape of neglect of that care to ascertain the genuineness of his wares which the law may fairly require of a trader.

Tied public-houses are very general in the brewing-trade now, but this unique and profitable relation would soon cease if *White* v. *City of London Brewery Co.* (38 W. R. 82) had been decided differently, i.e. if the brewer-mortgagee in possession were accountable for the profits of his own beer supplied to the tied house. These are profits not of the house but the brewery. It is quite right however that if the mortgagee lets the house he should be charged with the difference between the rent of it as a tied house and what it would fetch as a free house. After the decision in *Re Prytherch* (42 Ch. D. 590) a mortgagee will probably think twice before he enters into possession, for if he does so he cannot go out again when he pleases or get a receiver appointed, at least by the Court. Why a solicitor who takes a mortgage from his client should not be allowed profit costs of the preparation of the mortgage it is difficult to see (*Re Roberts*, 23 Ch. D. 52). Surely there is some fallacy latent in Kay J.'s reasoning. The solicitor fills two characters: as mortgagee he is entitled to costs, why should he be less so because he instructs himself?

The rule in equity is, that if a mortgagee sells he cannot sue the mortgagor on his personal covenant, because he has by selling disabled himself to reconvey. In the case of a pledge it is different (*Jones* v. *Marshall*, 61 L. T. R. 721). The pawnbroker who has sold may sue for the deficit. The Pawnbrokers' Act provides for the case of a surplus. It pays a tribute to professional prudence in ignoring the possibility of a deficit.

In cases of conditions of marriage with consent it is necessary to tread very warily, as Kay J. lately remarked of bill of sale cases. Take for instance a legacy given to a young lady if she marries with consent. Here the condition as to consent is treated as *in terrorem* only, unless there is a gift over to show it was really meant. Thereupon the legatee jumps, perhaps naturally, to the conclusion that the condition being gone she may claim the legacy at once, as she did in *Gray* v. *G.* (Ir. R., 33 Ch. D. 399): 'but stay, the law hath yet another hold on thee.' The doctrine only dispenses with the consent, not with the marriage (*Garbut* v. *Hilton*, 1 Atk. 381). The legatee must marry—whether with or without consent is immaterial—but she must marry. However, she has her whole life to perform this condition. *Re Knox* (Ir. R., 23 Ch. D. 529) was a case of a condition of a more exacting kind. There the testator's son was to forfeit all his interest unless he should 'marry a Protestant wife, the daughter of Protestant parents, and who have always been Protestants.' A condition not to marry a Roman Catholic has been held valid (*Duggan* v. *Kelly*, 10 Ir. Eq. 295), so has a condition not to marry a person who was not a Jew by profession and birth (*Hodgson* v. *Halford*, 11 Ch. D. 959). *Re Knox* goes farther. However, the Court held it good. Such restraints on marriage, provided they are partial, the law concedes to the caprice or imbecility of

testators, but they must sometimes seriously embarrass 'Cœlebs in search of a wife.'

In an age when all our institutions are liable to change the question is certain sooner or later to be agitated whether the 4th and 17th sections of the Statute of Frauds ought not to be repealed. This is not an enquiry to which a prudent man will give an off-hand answer. It is however certain that these sections, and especially the 4th, do occasionally make doubtful the validity of contracts which were probably not within the contemplation of the lawyers who drafted the Statute. *Gray* v. *Smith*, 43 Ch. Div. 208, illustrates our meaning. *X* agrees with his partner *A* to retire from the partnership. This retirement involves the surrender of an interest in land belonging to the partnership. *A* brings an action for specific performance. One defence is that the agreement affects an interest in land and is bad for want of a memorandum within the 4th section of the Statute. The judges before whom the case comes hold that there is a sufficient memorandum, but also are clearly of opinion that such a memorandum is necessary. The inference seems inevitably to follow that the omission of a few words in a rough draft might easily have rendered invalid an agreement for retirement from a partnership, though not a contract which *prima facie* would appear to fall within the 4th section of the Statute.

'An infant,' said Lord King, 'has no privilege to commit a fraud:' but if the decision in *De Francesco* v. *Barnum* (43 Ch. D. 165) is correct, an infant seems at liberty to commit a gross breach of faith with impunity. Chitty J. in that case refused an injunction in deference to an old authority, *Gylbert* v. *Fletcher* (Cro. Car. 179), which certainly lays it down in unqualified terms that no action on covenant will lie against an infant under an apprenticeship deed; and *Lylly's Case* (7 Mod. 15) is to the same effect. In Comyns' Dig. (Enfant, c. 2) it is said, 'A covenant by an infant to bind himself apprentice does not bind except when it is warranted by the custom of London or by Statute 5 Eliz. 4;' but it is observable, that this is stated under the head of acts which an infant cannot do 'to his prejudice.' What the Court looks at in infants' contracts is the *benefit* of the infant. This is the governing principle, and it is only by keeping it steadily in view that the cases can be reconciled or understood. An apprenticeship deed is not as of course for the benefit of the infant. Unless surrounded with proper safeguards it may be oppressive; and it is probably because the apprenticeship indenture under the custom of London was in such a form as to be beneficial to the infant that the master had under it the same remedies against the apprentice on his covenant as if he had been of full age (*Horn* v. *Chandler*, 1 Mod. 271). It is to be noted too that in *Gylbert* v. *Fletcher* the infant apprentice had merely departed from his service without license: he had not as in *De Francesco* v. *Barnum* engaged himself to another. The case was one therefore where the Court might have granted an injunction to restrain the young lady from dancing for Mr. Barnum, though it would not have granted specific performance (*Montague* v. *Flockton*, 16 Eq. 189); but of course, if Mr. Justice Chitty's view of *Gylbert* v. *Fletcher* is correct, and no action would lie on the contract whether beneficial or not, no injunction could be granted.

The Courts are slowly developing the legal results of the Infants Relief

Act. With the aid of recent reports and digests we may come to one or two negative conclusions hardly satisfactory to young gentlemen who think the law has freed them from all liability in respect of obligations incurred before they attained the age of twenty-one.

1. An infant who borrows money for the purchase of necessaries and with the knowledge of the lender spends the loan in buying, e. g. food and clothes, is liable after twenty-one for the repayment of the loan. *Lewis* v. *Alleyne*, 4 Times L. R. (C. A.) 560.

2. An infant who purchases a plot of freehold land from trustees of a building society of which he is a member on the terms of paying for it in monthly instalments and has paid instalments after he comes of age, is compellable to pay the residue. *Whittingham* v. *Murdy*, 60 L. T. 956.

3. An infant who as a shopman fails to account for monies he has received for his employers, and after he comes of age signs a memorandum acknowledging that he owes the money, giving a promissory note for the same, and charging with the debt a legacy due to him under a will, may be compelled out of the legacy to pay the money due. *In re Seager*, 60 L. T. 665.

4. An infant agrees to become tenant of a house and to pay the landlord £100 for the furniture therein and actually pays £60, and also uses the house and furniture for some months. On coming of age he can get the contract set aside, as also a promissory note for the £40 still due on the furniture, but he cannot recover back the £60 already paid. *Valentini* v. *Canali*, 24 Q. B. D. 166.

5. A contract or settlement in contemplation of marriage entered into by an infant is voidable, but does not come within s. 2 of the Infants Relief Act. *Duncan* v. *Dixon*, 6 Times L. R. 222.

Swaine v. *Wilson*, 24 Q. B. Div. 252, establishes no new principle. It determines in accordance with *Collins* v. *Locke*, 4 App. Cas. 674, that where the object of a society is not in itself illegal, rules made for the *bonâ fide* purpose of protecting its funds from claims which may be avoided are not illegal simply because they are incidentally in restraint of trade. The case nevertheless has a certain importance, because it is one of a class raising a question which has perplexed, and is likely still further to perplex, both the Courts and the Legislature. This inquiry is, what are the limits within which the law should protect or tolerate societies which, in promoting the interests of their members, do act in restraint of trade, and therefore to a certain extent interfere with the interests of the public. What, to put the matter more generally, are the limits to the 'right of association'? In discussing this matter two different questions are apt to be confounded. First, whether particular agreements are injurious to the public? Secondly, whether agreements which indirectly may injure the public are necessarily unlawful? It is needful to keep these two matters apart. For the assumption is often made that because judges in past times thought agreements injurious to the public, which we hold either harmless or beneficial, modern judges have less authority than their predecessors to treat as illegal agreements or combinations which they in accordance with modern opinion hold to be injurious to the State, or in technical language, to be opposed to public policy. The soundness of this assumption is open to question.

Woolcott v. *Peggie*, 15 App. Ca. 42, should be read in connexion with Mr.

Challis's article printed above. It shows that the course of registration does not invariably run smooth under the Torrens system. No rational advocate of that system, however, would maintain that it renders mistakes impossible; and apparently this is the first case of the kind before the Judicial Committee. One may even suppose that if there had been relevant decisions in the Supreme Court of Victoria, the research of Sir H. Davey and Mr. Finlay would have discovered them.

Once more we beg to urge upon our contributors and correspondents the necessity of writing as concisely as possible. At this moment we have standing over, merely for want of space, at least as much matter, and all of it good, as would make up another whole number.

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